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Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE E. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONERS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 53-C-1245

Illinois Central Railroad Company, Plaintiff,

vs.

National Railroad Adjustment Board, et al., Defendants

Statement

The above cause was filed May 22, 1953. Illinois Central Railroad was the original plaintiff, and National Railroad Adjustment Board, Third Division and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett, and J. H. Sylvester, as members of and constituting the Third Division of said Board, and Donald F. McMahon, acting as Referee, and Member of said Board, by direction of the National Mediation Board, were the original defendants. Order of Railroad Telegraphers was added as a party defendant on June 19, 1953, pursuant to leave of court.

1. May 22, 1953, verified complaint filed.
2. May 27, 1953, Illinois Central Railroad Company's motion for mandatory order or restraining order filed.
3. June 15, 1953, Motion of Order of Railroad Telegraphers to intervene as party defendant filed.
4. June 19, 1953, Answer of Order of Railroad Telegraphers filed.
5. June 17, 1953, Opposition of Order of Railroad Telegraphers to Motion for preliminary injunction filed.
6. June 17, 1953, Motion of Labor Members of Adjustment Board to dismiss complaint filed.
7. June 17, 1953, Opposition of Labor Members of Adjustment Board to motion for preliminary injunction filed.
8. June 19, 1953, Plaintiff's Memorandum Brief in Support of Motion for Mandatory Order filed.
9. June 29, 1953, Answer of defendant, carrier members of Adjustment Board, filed.

[fols. 3-4] 10. June 30, 1953, Amended verified complaint filed.

11. June 30, 1953, Motion of United States of America on behalf of defendant, National Railroad Adjustment Board, filed.

12. June 30, 1953, Memorandum of Points and Authorities on behalf of defendant, National Railroad Adjustment Board, filed.

13. July 2, 1953, Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to dismiss filed.

14. July 2, 1953, Memorandum of Law of Defendant Carrier Members filed.

None of the defendants was arrested, nor was bail required. No property was attached or taken.

July 3, 1953, a hearing was had before the honorable Michael L. Igoe. No question was referred to a Master, commissioner or referee. On July 3, 1953, a preliminary injunction was entered as prayed by plaintiff. Notice of appeal was filed July 30, 1953.

The appellees and their attorneys of record are:

For the plaintiff, Illinois Central Railroad—Herbert J. Deany, John W. Foster, and Charles I. Hopkins, Jr., 135 E. Eleventh Place, Chicago, Illinois.

For the Carrier Members of the Adjustment Board—Kenneth F. Burgess, Donald F. Smith, D. Robert Thomas, Walter J. Cummings, Jr., and Sidley, Austin, Burgess & Smith, 11 South La Salle Street, Chicago, Illinois.

For the National Railroad Adjustment Board, an agency of the United States of America—Otto Kerner, Jr., United States Attorney, 450 U. S. Court House, Chicago, Illinois.

Jacobs, Kamin and Ratner, 201 North Wells Street, Chicago 6, Illinois.

Mozart G. Ratner.

Schoene & Kramer, 1625 K Street, N. W., Washington 6, D. C.

Milton Kramer, Counsel for Defendants-Appellants, Whitehouse, et al., and Order of Railroad Telegraphers.

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION—Filed May 27, 1953

Now comes the Illinois Central Railroad Company, plaintiff in the above-entitled cause, by Herbert J. Deany, John W. Foster and Charles I. Hopkins, Jr., its attorneys, and moves the Court for an order based upon the verified complaint heretofore filed herein:

1. Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722 before the National Railroad Adjustment Board, Third Division, upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, as required by Section 3(j) of the Railway Labor Act (45 U. S. C. A. Section 153j), and

2. Restraining and enjoining the defendants, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, or, in the alternative, for a preliminary order restraining said defendants and each of them from proceeding with a hearing or from taking any other action whatsoever in said Docket No. TE-5722 pending final hearing and determination of this action.

Dated at Chicago, Illinois, this 25th day of May, 1953.

Illinois Central Railroad Company, by Herbert J. Deany, John W. Foster, Charles I. Hopkins, Jr., Its Attorneys.

[fol. 6] IN UNITED STATES DISTRICT COURT

MOTION TO INTERVENE AS A DEFENDANT—Filed June 15, 1953

The Order of Railroad Telegraphers, by its undersigned attorneys, moves for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that the representation of the applicant's interests by existing parties may be inadequate and the applicant may be bound by a judgment in this action; in that, as appears from paragraph VI of the Complaint, the applicant is the claimant before the National Railroad Adjustment Board, Third Division, in the claim having Docket No. TE-5722, which claim the plaintiff in this action seeks to enjoin the present defendants from considering further; the present defendants may assert no interest in protecting their right to consider the claim, whereas the applicant is entitled to have its claim considered and adjudicated by the Board in accordance with the provisions of the Railway Labor act but would effectively be deprived of that right by the relief requested by plaintiff.

Alternatively, The Order of Railroad Telegraphers moves to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that its claim upon the defendants to consider and adjudicate its claim in Docket No. TE-5722 in accordance with the Railway Labor Act, which plaintiff seeks to enjoin, and its claim upon plaintiff as presented in Docket No. TE-5722, present both questions of law and fact which are common to the main action.

Mozart G. Ratner, 201 N. Wells Street, Chicago, Illinois; Milton Kramer, Schoene and Kramer, 1625 K Street, N. W., Washington 6, D. C., Attorneys for The Order of Railroad Telegraphers.

[fol. 7] IN UNITED STATES DISTRICT COURT

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION—Filed June 17, 1953

Comes now the defendant The Order of Railroad Telegraphers (hereinafter referred to as "ORT"), by its attorneys, and opposes the Motion of the plaintiff for a preliminary injunction on the following grounds:

1. The complaint fails to state a claim against any defendant upon which relief can be granted.

2. This action involves and grows out of a labor dispute. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives the Court of jurisdiction to grant injunctive relief in such an action.

3. The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies in section 3, First, (p) thereof the procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards. Such method of judicial review is exclusive. The Court is therefore without jurisdiction of the subject matter. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (C. A., D. C., 1941); *Switchman's Union* v. *Nat. Mediation Bd.*, 320 U. S. 297; *General Committee* v. *MKT R. Co.*, 320 [fol. 8] U. S. 323; *General Committee* v. *Southern Pac. Co.*, 20 U. S. 338; *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239; see also *In Re Central R. of N. J.*, 145 F. (2d) 351, aff'd 326 U. S. 561; *Radio Officers Union* v. *Nat. Med. Bd.*, 181 F. (2d) 801.

4. Plaintiff has failed to exhaust its administrative remedies. *Yakus* v. *United States*, 321 U. S. 414.

5. The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

6. The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide this defendant's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion, in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not, harm plaintiff, depending on how the referee determines other issues.

7. In the event the last contingency described in paragraph 6 is the one that eventuates and if ORT institutes proceedings to enforce compliance with the resulting award then if plaintiff's views concerning the requirement of notice are sound it will have an adequate defense to such enforcement proceedings, and will not be harmed. It thus has an adequate remedy at law.

8. As appears from paragraphs VI and XI of the Complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of [fol. 9] services in its craft. In such situation not only is BRC not a necessary part in Docket No. TE-5722, but it would not even be a proper party. *Order of Railroad Telegraphers* v. *N. O. T. and M. Ry. Co.*, 156 F (2d) 1 (C. C. A. 8, 1946), cert. den. 329 U. S. 758.

9. As it appears from paragraph XI of the complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency of the dispute before the Board satisfies such requirement. *Hunter* v. *A.T.&S.F. Ry. Co.*, 188 F. (2d) 294 (C. A. 7,

1951), cert. den. 342 U. S. 819; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 8, 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (C. A. 3, 1951).

Wherefore, it is submitted that the motion for preliminary injunction should be denied.

Respectfully submitted, Milton Kramer, Schoene and Kramer, 1625 K Street, N. W., Washington 6, D. C.; Mozart G. Ratner, 201 North Wells Street, Chicago 6, Illinois.

[fol. 10] IN UNITED STATES DISTRICT COURT

OPPOSITION OF CERTAIN DEFENDANTS TO MOTION FOR PRELIMINARY INJUNCTION—Filed June 17, 1953

Come now the defendants J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, and R. Sarchet, by their attorneys, and oppose the motion for a preliminary injunction on the following grounds:

1. The complaint fails to state a claim against any defendant upon which relief can be granted.

2. This action involves and grows out of a labor dispute. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives the Court of jurisdiction to grant injunctive relief in such an action.

3. The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies in section 3, First, (p) thereof the procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards. Such method of judicial review is exclusive. The Court is therefore without jurisdiction of the subject matter. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 C. A., D. C., 1941); *Switchmen's Union* v. *Nat. Mediation Bd.*, 320 U. S. 297; *General Committee* v. *MKT R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pac. Co.*, 320 U. S. 338; *Slocum* v. *D. L. & W. R. Co.*, 339 U. S. 239; see also *In Re Central R. of N. J.*, 145 F. (2d) 351, aff'd 326 U. S. 561; *Radio Officers Union* v. *Nat. Med. Bd.*, 181 F. (2d) 801.

4. Plaintiff has failed to exhaust its administrative remedies. *Yakus* v. *United States*, 321 U. S. 414.

5. The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would [fol. 11] be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

6. The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide ORT's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not harm plaintiff, depending on how the referee determines other issues.

7. In the event that the last contingency described in paragraph 6 is the one that eventuates and if ORT institutes proceedings to enforce compliance with the resulting award, then if plaintiff's views concerning the requirement of notice are sound it will have an adequate defense to such enforcement proceedings, and will not be harmed. It thus has an adequate remedy at law.

8. It appears from paragraphs VI and XI of the Complaint, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of services in its craft. In such situation, not only is BRC not a necessary party in Docket No. TE-5722, but it would not even be a proper party. *Order of Railroad Telegraphers*

v. *N. O. T. and M. Ry. Co.*, 156 F. (2d) 1 (C. C. A. 8, 1946), cert. den 329 U. S. 758.

9. As appears from paragraph XI of the Complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency [fol. 12] of the dispute before the Board satisfies such requirement. *Hunter* v. *A. T. & S. F. Ry. Co.*, 188 F. (2d) 294 (C. A. 7, 1951), cert. den. 342 U. S. 819; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 8, 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (C. A. 3, 1951).

Wherefore, the above-named defendants submit that the Motion for Preliminary Injunction should be denied.

Respectfully submitted, Milton Kramer.

[fol. 13] In United States District Court

* * * * * * *

Motion of Certain Defendants to Dismiss—Filed June 17, 1953

Come now the defendants J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, and R. Sarchett, by their attorneys, and move to dismiss the complaint herein, for the following reasons:

1. The complaint fails to state a claim against any defendant upon which relief can be granted, in that:

(a) Plaintiff has failed to exhaust its administrative remedies.

(b) The complaint, and the motion, are premature, and do not present a situation calling for equitable relief. The referee may decide ORT's claim in favor of plaintiff on any one of the issues involved in the merits of the dispute, or on the issue of notice to others, or on both, or he may decide in favor of ORT both on the merits and on the question of notice. It is only in the event of the last contingency that plaintiff could even argue that it is harmed. And even

if the last contingency is the one that eventuates, plaintiff cannot be harmed unless ORT institutes proceedings for the enforcement of the award. This action, and the motion, in substance ask for equitable relief by way of injunction because the referee, who has not yet determined any issue in the proceeding before him, may determine one of the issues erroneously, and such alleged error may, or may not, harm plaintiff, depending on how the referee determines other issues.

(c) As appears from paragraphs VI and XI of the complaint the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has its own contract with plaintiff governing the performance of services in its craft. In such situation, not only is BRC not a necessary party in Docket No. TE-5722, but it would not even be a proper party.

(d) As appears from paragraph XI of the complaint, BRC has actual knowledge of the dispute pending before the Board in Docket No. 5722. It is well settled that even in those situations where some courts have held that notice was required to be given to others than the parties before the Board, actual knowledge by such others of the pendency [fol. 14] of the dispute before the Board satisfies such requirement.

2. The Court does not have jurisdiction of the subject matter.

(a) The Railway Labor Act (45 U. S. C., secs. 151 ff.) specifies the exclusive procedure for judicial review of awards of the National Railroad Adjustment Board and the determination of the validity of such awards.

(b) The Board, with the defendant referee sitting as a member thereof, has not made, and will make unless enjoined, a final determination of plaintiff's contentions, including its contention that any award in favor of ORT would be invalid unless notice of the Board's proceeding is given to others than the parties before it. The Board may, or may not, agree with plaintiff's contentions, and rule accordingly. Until it has made a ruling, there is no case or controversy within the meaning of the Constitution, Article III.

3. Plaintiff has an adequate remedy at law.

4. The only relief asked for is injunctive relief. The Norris-LaGuardia Act (29 U. S. C., secs. 101-15) deprives this Court of jurisdiction to grant injunctive relief in this action.

Respectfully submitted, Milton Kramer.

[fol. 15] In United States District Court

Answer of Intervenor the Order of Railroad Telegraphers—Filed June 29, 1953

Comes now the intervening defendant The Order of Railroad Telegraphers, by its attorneys, and for answer to the Complaint in this action says:

[fol. 16] First Defense

The complaint fails to state a claim against any defendant upon which relief can be granted.

Second Defense

Answering the allegations of the Complaint the intervening defendant (hereinafter referred to as "ORT") says:

I. It admits that plaintiff has been and is engaged in operating in Illinois and other States and is a common carrier by railroad in Illinois and between points in Illinois and in other States, and is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph I of the Complaint.

II. It admits that the National Railroad Adjustment Board, Third Division (hereinafter referred to as the "Board") was created by the Railway Labor Act and has its principal office at 220 S. State Street, in Chicago. The remainder of paragraph II consists of conclusions not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

III. It admits the allegations of paragraph III.

IV. It admits that Donald F. McMahon is a Referee selected by the National Mediation Board to act as a member of the Board for the purpose of disposing of certain

claims pending before the Board, and is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph IV.

V. It admits that this action is of a civil nature and the matter in controversy exceeds $3,000 exclusive of interest and costs. The remaining allegations of paragraph V are conclusions of law not requiring answer; insofar as they may be construed to contain allegations of fact, they are denied.

VI. It admits that there is pending before the Board a proceeding instituted by ORT on or about June 12, 1951, against plaintiff, Docket No. TE-5722, and denies the remaining allegations of the first sentence of paragraph VI. It denies the allegations of the second sentence. It is without knowledge or information sufficient to form a belief concerning the allegations of the third sentence. It alleges that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as "BRC"), and several officers, repre-[fol. 17] sentatives, and members of BRC had actual knowledge of the filing of the claim of ORT with the Board, which claim is contained in Docket TE-5722, and of the proceedings in said matter, and have knowledge of the pendency of said claim before the Board, and that the record before the Board shows such knowledge.

VII. It admits that on or about August 11, 1951, the plaintiff filed its submission with the Board in which it argued that BRC should be given formal notice of the proceeding, and that in its Reply filed on or about October 4, 1951, plaintiff argued that the claim should be dismissed unless such notice were given. The remainder of paragraph VII consists of argument and conclusions not requiring answer; insofar as it may be construed to contain allegations of fact, it is denied.

VIII. It admits that on or about May 13, 1953, the dispute, Docket No. TE-5722, came on for hearing and that on said occasion one of the carrier members of the Board moved that the Board not proceed with the matter. It alleges that the basis of said motion was that formal notice of the proceeding had not been given to BRC, and alleges further that BRC had actual knowledge of the proceeding, and that the record before the Board showed such knowl-

edge. It denies that at said hearing any motion was made that the proceeding be dismissed for lack of jurisdiction. It is without knowledge or information sufficient to form a belief concerning the remaining allegations of the first sentence of paragraph VIII. It alleges further that no motion has been presented to the Board that notice be given to BRC, and that when the motion against proceeding was made a member of the Board who is a vice-president of BRC stated that BRC was not involved in the dispute submitted to the Board by ORT.

It admits that the hearing was suspended and that the motion that the Board not proceed was considered in a private meeting, and denies any other allegations that may be contained in the second sentence. It alleges that the said consideration of the motion by members of the Board in private was without the presence or participation of the referee, Donald F. McMahon, one of the defendants in this action. It alleges that prior to the appointment of a referee to sit as a member of the Board in considering the dispute, Docket No. TE-5722, the ten permanent members of the Board had divided evenly on the question of whether [fol. 18] the claim should be dismissed because formal notice had not been given to BRC; that that question is one of the issues presented to the defendant referee, and to the Board with the referee sitting as a member, for decision; and that unless restrained and enjoined by this Court from further considering the dispute, that question will be decided by the Board with the referee sitting as a member.

It admits that on the same day the hearing in Docket No. TE-5722 was resumed and that a carrier member of the Board announced that the motion not to proceed had resulted in a tie vote and was therefore lost, and is without knowledge or information sufficient to form a belief concerning any other allegations that may be contained in the third sentence. It alleges that the defendant referee was not present and did not participate in any consideration of said motion and did not vote concerning the disposition of said motion, and will, unless enjoined, decide whether the claim should be dismissed for lack of formal notice to BRC.

It denies the allegations of the fourth sentence.

It admits that the hearing was resumed on the same day; denies that plaintiff is advised that the Board does

not intend to and will not give notice to BRC and to D. A. Shears or either of them; alleges that the question of whether the claim should be dismissed for lack of notice to BRC is one of the issues that the Board, with the defendant referee Donald M. McMahon sitting as a member, will decide unless enjoined from making a decision; and is without knowledge or information sufficient to form a belief concerning the remaining allegations of the fifth sentence.

It is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph VIII.

IX. It denies the allegations of paragraph IX.

X. It denies the allegations of the first sentence of paragraph X. The remainder of said paragraph consists of conclusions of law not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

XI. It denies that the Board has failed to comply with the requirements of Section 3(j) of the Railway Labor Act, and alleges that the question of whether the said section requires that notice be given to BRC is one of the issues [fol. 19] presented to defendant referee Donald F. McMahon and which the Board, with said referee participating, will decide unless enjoined. It is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph XI.

XII. Paragraph XII consists of conclusions of law not requiring answer, but ORT admits that any disposition of claims of rights of ORT under its contract with plaintiff, in Docket No. TE-5722, without formal notice served on BRC, would not adjudicate any rights, BRC may have under its contract with plaintiff, and alleges that such result would follow whether or not notice of Docket No. TE-5722 is served on BRC. Insofar as said paragraph may be construed to contain allegations of fact, they are denied.

XIII. It denied all allegations of fact contained in paragraph XIII.

XIV. Paragraph XIV consists of conclusions of law not requiring answer; insofar as it may be construed to contain allegations of fact, they are denied.

Third Defense

This action involves and grows out of a labor dispute, and the Court is deprived of jurisdiction to grant injunctive relief by the Norris-LaGuardia Act, 29 U.S.C., secs. 101-15.

Fourth Defense

(a) The Railway Labor Act specifies the method by which awards of the Board may be judicially reviewed and the validity thereof determined. The Court is without jurisdiction of the subject matter of this action.

(b) The contention of plaintiff that the claim should be dismissed for lack of notice to BRC has not yet been finally determined by the Board. Unless enjoined, the referee will make such determination. Until a final determination is made adverse to plaintiff's contentions, this action presents no case or controversy, and the Court is without jurisdiction of the subject matter.

Fifth Defense

BRC had and has actual knowledge of the submission to the Board by ORT of the dispute in Docket No. TE-5722, and of the pendency of said dispute before the Board. Inso- [fol. 20] far as the Railway Labor Act requires the Board to give notice of said dispute to BRC, which ORT denies, such requirement is satisfied by such actual knowledge. Wherefore, having fully answered, ORT prays that the complaint be dismissed.

Respectfully submitted, Mozart G. Ratner.

[fol. 21] In United States District Court

Answer of Defendant Carrier Members—Filed June 29, 1953

Now come defendants, William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley, and J. E. Kemp, the Carrier Members of the Third Division of the National Railroad Adjustment Board (hereinafter referred to as Defendant

Carrier Members), by Sidley, Austin, Burgess & Smith, their attorneys, and answer the Complaint as follows:

1. Defendant Carrier Members are without knowledge or information sufficient to form a belief as to the truth of paragraph XIV of the Complaint, but they admit the allegations contained in the remaining paragraphs of the Complaint.

2. In further answer to paragraph VI, Defendant Carrier Members allege that D. A. Shears and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Brotherhood of Railway Clerks) are "employees * * * involved" within the meaning of Section 3(j) of the Railway Labor Act and that plaintiff is entitled to raise the issue of lack of due notice, as established by decisions of the federal courts construing said Act.

3. In further answer to paragraph VIII, Defendant Carrier Members allege that the Board's action on defendant Horsley's motion was reported in its minutes of May 13, 1953, a copy of which is attached hereto as Exhibit 1 and made a part hereof. The defendant Donald F. McMahon, the Referee herein, was not permitted to participate with the Board in considering the due notice question, as shown in Exhibit 2 attached hereto and made a part hereof.

4. In further answer to paragraph X of the Complaint, Defendant Carrier Members allege that in response to numerous decisions of the federal courts, the First Division of the National Railroad Adjustment Board regularly complies with the due notice provisions of Section 3(j) of the Act, as shown in Exhibit 3 attached hereto and made a part hereof. Defendant Carrier Members further allege that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in the [fol. 22] defense of *Allain* v. *National Railroad Adjustment Board, Third Division*, Civil Action No. 51 C 238 (N.D. Ill.) on the ground that said Division's failure to give due notice pursuant to Section 3(j) of the Act, deprived the aggrieved employees of their constitutional and statutory rights, as shown in Assistant Attorney General H. G. Morison's letter of May 11, 1951, a copy of which is attached hereto as Exhibit 4 and made a part hereof. A copy of Judge Barnes'

findings of fact and conclusions of law in the *Allain* case is attached hereto as Exhibit 5 and made a part hereof.

5. Defendant Carrier Members allege that they have been and are now willing for the Board to serve due notice of all hearings herein upon D. A. Shears and upon the Brotherhood of Railway Clerks as required by Section 3(j) of the Railway Labor Act, but that the five Labor Members of the Board are unwilling for the Board to do so, as shown in Exhibit 1 attached hereto and made a part hereof.

6. Defendant Carrier Members allege that the Railway Labor Act does not confer any power upon defendant Donald F. McMahon, the Referee in the proceedings before the Board, to decide the due notice question involved herein. Section 3(i), in certain circumstances, permits disputes between employees and a carrier "growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, working conditions" to be referred to a Division of the National Railroad Adjustment Board, and Section 3(n) permits awards with respect to such disputes to be decided by a majority of all members of the Division. When a majority vote cannot be attained, Section 3(l) permits the appointment of a referee to make an award. However, no provision of the Act grants a referee authority to resolve the question whether due notice shall be given pursuant to Section 3(j). All the referee can do when the Board has not given the required due notice is either to vote to dismiss the claim or to vote to continue the claim (with no action as to the issuance of an award) until the Board gives due notice of the hearings. As shown in Exhibit 2 attached hereto and made a part hereof, this Division sat in executive session to rule on the due notice requirement of Section 3(j) and the referee was not permitted to attend the executive session, which was in accordance with the procedure of this Division, as shown in Exhibit 6 attached hereto and made a part hereof. Since the referee lacks any power to require [fol. 23] due notice to be given under Section 3(j) of the Act, this Complaint is timely.

7. Defendant Carrier Members allege that only parties and employees who have received due notice pursuant to Section 3(j) of the Railway Labor Act are permitted to participate in proceedings before the Third Division of

the National Railroad Adjustment Board, as shown in Exhibit 6 attached hereto and made a part hereof. Because the referee is without the power to determine the question of due notice and the Board has acted adversely on the question, neither D. A. Shears nor the Brotherhood of Railway Clerks will be afforded an opportunity to participate in the proceedings in Docket TE-5722 before the National Railroad Adjustment Board unless this Court grants appropriate relief.

8. Defendant Carrier Members allege that this Complaint is timely because, in view of the violation of Section 3(j) of the Act, the Board never acquired any jurisdiction in the premises. Having refused to exercise its duty under Section 3(j), the Board should be ordered to comply therewith.

Kenneth F. Burgess, Douglas F. Smith, D. Robert Thomas, Walter J. Cummings, Jr., Attorneys for William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, Defendants.

[fol. 24] EXHIBIT 1 TO ANSWER

EXTRACT—MINUTES MAY 13, 1953 EXECUTIVE SESSION, THIRD DIVISION, NATIONAL RAILROAD ADJUSTMENT BOARD

At 3:55 P. M., the Third Division went into executive session to take up objection by Member E. T. Horsley to continuing with hearing before Referee McMahon of Docket TE-5722, which objection he stated as follows:

I object to proceeding with the hearing on Docket TE-5722 for the reason that the Third Division of the National Railroad Adjustment Board had not given due notice to the employes involved under Section 153(j) of the Railway Labor Act, amended.

The employes involved are the Brotherhood of Railway Clerks, or constituents thereof, and the Brotherhood of Railway Clerks has served personal notice upon the responsible officers of the Illinois Central Railroad, respondent in this docket, of their intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' Organization is sustained in this proceeding.

After considerable discussion on the above matter, Mr. Horsley directed a question to the Secretary as to whether he had given notice to the Clerks' Organization. The Secretary asked the Chairman if it was proper for him to answer the direct question, and receiving an affirmative answer, stated that he had not given notice to the Clerk's Organization.

Mr. Kemp, Chairman, stated that the matter would come to a vote, and the matter to be voted on would be Mr. Horsley's objection to proceeding with this case in the absence of notice to the Clerk's Organization by the Board.

Upon vote the motion lost.

The Secretary was then requested to have the parties again appear, and the hearing before the referee resumed at 4:15 P. M.

[fol. 25] STATE OF ILLINOIS,
County of Cook, ss:

I, A. Ivan Tummon, Secretary of the Third Division of the National Railroad Adjustment Board, do hereby certify that the above is a true and correct copy of an extract from the minutes of May 13, 1953, of the Third Division of the National Railroad Adjustment Board.

(S.) A. Ivan Tummon.

Dated at Chicago, Illinois, this 8th day of June, 1953.

EXHIBIT 2 TO ANSWER

June 8, 1953

Stanley N. Barnes, Esq.
Assistant Attorney General
United States Department of Justice,
Washington, D. C.

Re: Illinois Central Railroad Company v. National Railroad Adjustment Board, 3rd Division—Civil No. 53 C 1245

DEAR SIR:

For consideration in determination of the steps to be taken for the defense of the above styled case, we are

making the following comments in answer to your queries (a) and (b), which are reproduced here for facility:

"(a) Whether the Board itself, as originally constituted, has finally voted and thereby finally decided not to give notice of the proceedings before the Board to the Clerks' Union and to Mr. D. A. Shears, the person now filling the position."

The Board, as originally constituted, voted upon the motion that the Board not proceed with this matter for want of jurisdiction because of notice not having been given. The motion failed to carry, as explained in paragraph VIII (page 4) of the Bill of Complaint, and this Division was thereby precluded from issuing such notice. During consideration of this motion in executive session of the Board, with the Secretary of this Division present, it was determined from the latter officer that such notice had not been given.

"(b) Whether the question of giving notice is still an [fol. 26] issue before the Board (including the referee among its membership) yet to be decided."

It is this Division's practice to consider all matters of procedure in a so-called Executive Session with only the regular, normal complement of the Division present. That is why all public members, and the referee, were excluded from the Board Room when the motion was entertained by this Division on May 13 as alleged in the Bill of Complaint. Therefore, it is the opinion of the Carrier Members that when this Division, with its normal complement, refused to observe its duty under section 3(j) of the Act as explained in the answer to Query (a), the answer to Query (b) must be that the question of giving notice is not now an issue before the referee.

Respectfully submitted for Carrier Members, by J. E. Kemp, Chairman.

EXHIBIT 3 TO ANSWER

STATE OF ILLINOIS,
County of Cook, ss:

T. L. Green, being first duly sworn, on oath deposes and says that,

1. He is Chairman of the First Division of the National Railroad Adjustment Board, with offices at 39 South La-Salle Street, Chicago, Illinois.

2. Notices to appear and participate in proceedings before the Board, as required by Section 3 (j) of the Railway Labor Act, have been given to employees when the employees' position might be adversely affected or when the interpretation of a collective bargaining agreement might affect their rights, in Docket No. 22895 and Docket No. 30074, Appendices A and B, attached hereto.

Further affiant sayeth not.

T. L. Green.

Subscribed and sworn to before me this 29 day of June, A. D. 1953. Vera L. Stang, Notary Public.

[fol. 27] EXHIBIT 3—APPENDIX A

National Railroad Adjustment Board, First Division

39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

October 26, 1951

Registered Mail—Return Receipt Requested.
Mr. Richard Plum,
% Chicago, Aurora & Elgin Railway Company,
400 North Liberty Drive,

Wheaton, Illinois.
DEAR MR. PLUM:

Enclosed is one copy of each ex parte submission by the parties to the dispute in Docket 22895, consisting of "Claim

that the name of R. Plum be removed from the Conductor's Seniority Roster", Chicago, Aurora and Elgin Railway Company.

This is to notify you that you may, within thirty (30) days from the date of receipt of this letter, file a response to the submission or signify your desire for an oral hearing.

By direction of the Division.

Yours very truly, J. M. MacLeod, Executive Secretary.

EXHIBIT 3—APPENDIX B

National Railroad Adjustment Board, First Division

39 South La Salle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

November 14, 1952

Copy

Registered Mail—Return Receipt Requested.
Mr. Milton P. Hanson,
2826 Hamilton Street,
LaCrosse, Wisconsin.

DEAR MR. HANSON:

Enclosed is a copy of joint submission by the parties to the dispute in our Docket 30074, consisting of "Demand [fol. 28] for Removal of Fireman Milton P. Hanson, LaCrosse Division from service of the Chicago, Burlington and Quincy Railroad account not maintaining membership in the Brotherhood of Locomotive Firemen and Enginemen as required by the provisions of the Union Shop Agreement, effective August 16, 1951 * * * ".

This is to notify you that you may, within (30) days from date of receipt of this letter, (1) file a response to the submission and (2) signify your desire to appear at oral hearing.

The hearing of this case, scheduled for 2:00 P. M., No-

vember 12, 1952 has been postponed to 10:00 A. M. December 15, 1952.

By direction of the Division.

Yours very truly, (S.) J. M. MacLeod, Executive Secretary.

EXHIBIT 4 TO ANSWER

"DEPARTMENT OF JUSTICE
Washington, D. C.

May 11, 1951.

"HGM-JEK
124-23-27

"Mr. A. I. Tummon, Acting Secretary,
National Railroad Adjustment Board, Third Division,
220 S. State St.,
Chicago 4, Illinois.

"DEAR MR. TUMMON:

"This will reply to your letter of April 12, 1951, in which you state that Otto Kerner, Jr., United States Attorney, informed you that this Department was not in a position to represent the Third Division of your Board in the defense of the action of *Fran Allain, et al.*, v. *National Railroad Adjustment Board, Third Division, et al.*, 51 C 238, pending in the United States District Court for the Northern District of Illinois, Eastern Division. We note that you asked us to advise you the reason why we cannot represent you in this case.

"It appears that this is a class action brought by plaintiffs against the Third Division of your Board, its members and referee, the Brotherhood of Railroad Trainmen and the Western Pacific Railroad Company to set aside an [fol. 29] order of the Board under which the Western Pacific was ordered to employ dining car stewards as lounge car attendants in place of these plaintiffs, as a result of which the plaintiffs were required to accept less remunerative positions. It also appears that the plaintiffs had occupied the position of lounge car attendants for, on the average, several years and were relatively few in number.

"The pleadings and the findings of the Court disclose that none of the plaintiffs nor the Cooks and Waiters' Union, Local 456 (the certified collective bargaining agent of plaintiffs) were given notice of the pendency of the proceedings before the Board preceding the entry of this order, or were informed of any waiver by the parties of an oral hearing, and that none of them actually had knowledge of these matters. This information is confirmed in a communication to us by Mr. Kerner. It is, therefore, our opinion that these employees were deprived of their position without regard to their constitutional rights and it is not thought that this Department should defend an order having that effect. As you probably know, similar orders of the National Railroad Adjustment Board in several cases have been held to be void for failure to give notice to aggrieved employees. In *Griffin* v. *Chicago Union Station, et al.*, 13 F. Supp. 722, the United States District Court for the Northern District of Illinois so held. At that time the Department refused to join in the appeal on the ground that it believed the District Court's decision to be correct. The judgment of the District Court was affirmed by the Court of Appeals for the Seventh Circuit, sitting in Chicago, in *Nord* v. *Griffin*, 86 F. 2nd 481, and the Supreme Court refused to review the case (300 U. S. 673). Subsequently, the Seventh Circuit has twice reaffirmed its holding in the Nord case. (*Railroad Yardmasters of North America, et al.* v. *Indiana Harbor Co., et al.*, 166 F. 2d 326, affirming judgment of the District Court for the Northern District of Indiana, 70 F. Supp., 914, and *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.* 171 F. 2d 594, certiorari denied 337 U. S. 916, affirming judgment of the District Court for the Northern District of Illinois, 78 F. Supp. 984). Courts of appeals for other circuits have uniformly reached the same conclusion. See *Brotherhood of Railroad Trainmen* v. *Templeton* (C. A. 8) 181 F. 2d 527, certiorari denied 340 U. S. 823; *Estes* v. *Union Terminal Co.* (C. A. 5) 89 F. 2d 768; *Mary Kirby* v. *Pennsylvania R. Co.* (C. A. 3) decided April 23, 1951. Furthermore, in a brief filed by the Govern-[fol. 30-41] ment in the Supreme Court in another case, it was clearly implied that the decision in *Nord* v. *Griffin*, referred to above, was correct, and the reasoning of the

Supreme Court in its subsequent decision in *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U. S. 711 indicates plainly that individual employees have rights of separate representation before the Adjustment Board.

"It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case.

"The position that we take in this matter, is, as is indicated above, not one of first impression. Not only did this Department refuse to join in the appeal of the *Griffin* case, but it appears that the Department did not represent the Board in any other case referred to above in which the Board was a party, nor did it defend the Board's order in any of these cases in which the Board was not a party.

Sincerely yours, (S.) H. G. Morison, Assistant Attorney General.

cc: Otto Kerner, Jr., United States Attorney".

[fol. 42] EXHIBIT 6 TO ANSWER

Affidavit of C. P. Dugan

STATE OF ILLINOIS,
County of Cook, ss:

C. P. Dugan, being first duly sworn, on oath deposes and says that,

1. He is a Carrier Member of the Third Division of the National Railroad Adjustment Board, with offices at 220 South State Street, Chicago, Illinois.

2. The National Railroad Adjustment Board, Third Division, permits only parties or persons receiving due no-

tice from the Board, pursuant to Section 2(j) of the Railway Labor Act, to participate in proceedings before the Board.

3. The Board does not permit persons having merely actual notice of proceedings before the Board to participate therein.

4. It is the practice of the Third Division to consider matters of procedure in executive session at which only the regular 10 members and the Secretary of this Division are [fol. 43] permitted to be present and at which only the regular 10 members are permitted to vote.

Further affiant sayeth not.

C. P. Dugan. (Seal.)

Subscribed and Sworn to before me this 29th day of June, A. D. 1953. Irma Verch, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT—Filed June 30, 1953

Now comes the plaintiff, Illinois Central Railroad Company, and presents this, its Amended Bill of Complaint, against defendants, National Railroad Adjustment Board, Third Division, and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchet and J. H. Sylvester, as members of and constituting the Third Division of said [fol. 44] Board, and Donald F. McMahon, acting as Referee and Member of said Board by direction of the National Mediation Board, and for cause of action says that:

I. The plaintiff, Illinois Central Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and has been for many years past and is now engaged in operating a railroad in, into and through the State of Illinois and other states and has been and is a common carrier of freight and passengers by railroad within the State of Illinois and between points in the State of Illinois and in other states, and that said Railroad Company has its principal place of

business in the City of Chicago, County of Cook, State of Illinois.

II. Defendant National Railroad Adjustment Board, Third Division (hereinafter referred to as the Board), is an administrative body created by an act of Congress entitled "Railway Labor Act," 45 U. S. C. A., § 151 et seq., enacted May 20, 1926, as amended June 21, 1934, and has its principal office at 220 South State Street, City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

III. Defendants William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchet and J. H. Sylvester are the duly selected, qualified and acting members of the Board, having individual and collective offices at 220 South State Street in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

IV. Defendant Donald F. McMahon is a Referee selected by the National Mediation Board pursuant to § 3 First (1) of the Railway Labor Act [45 U. S. C. A., § 153 First (1)] and assigned to the Third Division of the Board, where he acts as a member thereof for the purpose of disposing of certain controversies which have been certified to the National Mediation Board for disposition; and while acting in the aforesaid capacity, defendant Donald F. McMahon has as his principal office the office of the Board at 220 South State Street in the City of Chicago, State of Illinois, in the Northern District of Illinois, Eastern Division.

V. This action is of a civil nature in equity and is a suit arising under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of [fol. 45] interest and costs, the sum of $3,000 and jurisdiction is vested in this Court by virtue of the provisions of Title 28 U. S. C. A., § 1337. By this suit plaintiff seeks a mandatory order requiring defendants, before proceeding further, to forthwith serve notice of the claim hereinafter more specifically set forth on all parties involved (who are necessary parties to said claim), as provided for in § 3(p) of the Railway Labor Act [45 U. S. C. A., § 153(j)], which provides that the Board "shall give due notice of all hearings to the employee or employees * * * involved in any dispute submitted to them," or, in the alternative, enjoin-

ing the Board from persisting in its refusal to serve notice of said claim upon all individuals whose employment rights may be affected by a disposition of such claim and from further proceeding with said dispute unless and until said Board has complied with the mandatory requirements of § 3(j) of the Railway Labor Act.

VI. There is presently pending before the Board a proceeding instituted on, to wit, June 12, 1951, by the Order of Railroad Telegraphers against plaintiff herein, entitled "*The Order of Railroad Telegraphers* v. *Illinois Central Railroad Company*," Docket No. TE-5722, which proceeding involves the employment rights of certain employees in and to a position at Palestine, Illinois, presently filled by D. A. Shears of 708 North Howard Street, Robinson, Illinois, who is a member of the craft represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks). The employment rights of the said D. A. Shears and the members of the craft represented by the Clerks will necessarily be affected and are involved in said dispute presently pending before the Board. Neither the said D. A. Shears, the said Clerks nor any member of the craft represented by the Clerks has been served with notice of said proceeding pursuant to the requirements of § 3(j) of the Railway Labor Act. [45 U. S. C. A., § 153(j)].

VII. That on, to wit, August 11, 1951, plaintiff herein, being the carrier involved in said dispute, filed its submission with the Board specifically setting forth, among other things, that the position involved was at the time occupied by William E. McDaniel, a clerk; that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on this carrier and in the industry; and that the claim was in reality one between the Order of Railroad Telegraphers and the Clerks and should [fol. 46] be dismissed unless the Board gave each organization an opportunity to present its side of the case.

VIII. That on, to-wit, May 13, 1953, said dispute, Docket No. TE-5722, came on for hearing before the Board with the Referee sitting as a member at a regular session thereof and on said occasion E. T. Horsley, a defendant herein and one of the members of said Board, upon ascertaining that no notice had been sent out to the Clerks or to mem-

bers of the craft represented by said Clerks who are directly involved in said suit, objected to further proceedings before the Board for the reason due notice had not been given the employees involved. That thereupon the public session was adjourned and said objection was considered by the regular members of the Board in executive session. That in the consideration of such matters it was and is the custom and practice of the Third Division to exclude the Referee and to limit the consideration and the vote on such matters to the regular members of the Division. That although the Referee was sitting at this time as a member of the Board for the purpose of considering the dispute in Docket No. TE-5722, said Referee, in accordance with the Division's custom and practice, was excluded from participating in the consideration of the said E. T. Horsley's objection as to lack of proper notice. That thereafter, on the same day, the public session was reconvened and said E. T. Horsley announced in open session that his objection as to want of jurisdiction had resulted in a tie vote of the Board and was therefore lost. That in recognition of the prevailing custom and practice the said Referee was not requested by the Board or by any member thereof, nor did he request an opportunity, to vote on the question of notice raised by the objection although he was in attendance at the time said objection was made and at the time the announcement was made that the objection as to want of jurisdiction had resulted in a tie vote. That the said E. T. Horsley thereupon, the said Referee being present and sitting as such Referee objected to further proceedings in said matter until the Board had complied with the mandate of § 3(j) of the Railway Labor Act [45 U. S. C. A., § 153(j)] with reference to the giving of notice to parties involved. That, notwithstanding said objection and the positive mandate of the statute, the hearing was resumed with the acquiescence of the Referee on said date, and plaintiff charges [fol. 47] that the Board does not intend to and that it will not give the statutory notice to the Clerks and to the said D. A. Shears, or to either of them, and avers that further demand that the Board or any of the said defendants do so would be unavailing. Plaintiff further avers that the Board will hold further proceedings in said matter without complying with the mandatory requirements of the statute

concerning notice to involved parties unless said action is enjoined by this Honorable Court.

IX. Plaintiff therefore charges the fact to be that, irrespective of the requirements of § 3(j) of the Railway Labor Act, the Board has refused and continues to refuse to serve notice of the proceeding upon the Clerks and upon D. A. Shears, or either of them.

X. This arbitrary action of the Board is taken in the face of and with complete disregard of the requirements of said statute and of the numerous decisions by this Honorable Court and other Federal courts which interpret § 3(j) of the Railway Labor Act as requiring that notice of a proceeding be given to all individuals whose employment rights may be adversely affected or involved by the decision to be rendered by the Board. Plaintiff further alleges that for several years last past the Board has continuously and deliberately pursued, and continues to pursue, a custom and practice of denying the right of participation in any claim pending before it to any party or employee involved but not formally served with notice of the proceeding. That said custom and practice excludes employees and unions other than the one filing the claim with the Board and those seeking to represent them from participating in hearings before the Board. As recently as May 6, 1953, in the case of *Frank Allain, et al.* v. *National Railroad Adjustment Board, Third Division, et al.*, Civil Action No. 51-C-238, this Honorable Court found as a conclusion of law that:

"The long-continued practice of the National Railroad Adjustment Board Third Division, of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearing before the Board, constitutes a violation of rights guaranteed said individuals by the Railway Labor Act and the Fifth Amendment to the Constitution of the United States, and this is so without regard to whether or not said individuals may have received formal notice from the Board or may have otherwise acquired knowledge of said proceeding."

[fol. 48] XI. Plaintiff has been informed in writing by the General Chairman of the Clerks, and charges, that in the event the employment rights of members of the Clerks are adversely affected by the claim filed in said Docket No. TE-

5722 before the Board, the Clerks will present and prosecute to the fullest extent a claim against plaintiff based upon the same employment rights which are involved in said proceeding before the Board. If the Board persists in its failure to comply with the requirements of § 3(j) of the Railway Labor Act, plaintiff will be continuously burdened by multiple suits and vexatious legal proceedings.

XII. Plaintiff further alleges that in the event the Board should proceed with a disposition of the claim of the Order of Railroad Telegraphers, docketed as No. TE-5722, without serving notice on the Clerks and find that the employment rights of the position presently held by members of the Clerks properly belong to the members of the Order of Railroad Telegraphers, such a finding would not adjudicate the rights of the Clerks and would not preclude the Clerks from prosecuting an independent right of action under the Railway Labor Act against plaintiff. If the Board should decide such subsequent independent claim was valid, plaintiff would be forced to make payments to both organizations for the same position although the services of the members of only one of the organizations were actually used.

XIII. Plaintiff further alleges that the public policy of the United States of America (as evidenced by § 3(j) of the Railway Labor Act) with respect to the conduct of labor relations between common carriers by railroad and their employees is to dispose of the claims of all individuals whose employment rights may be adversely affected by a decision in a single proceeding before the Board; and that the best interests of the public will be served by the enforcement of said declared policy and by the enforcement of the requirements of § 3(j) of the Railway Labor Act.

XIV. Plaintiff further alleges that it is without an adequate remedy at law; and that it will suffer substantial and irreparable injury and damage, and that such irreparable injury and damage will continue unless the defendants be enjoined from violating and ignoring the plain provisions of § 3(j) of the Railway Labor Act with respect to the service of notice upon the employee or employees whose em- [fol. 49] ployment rights may be adversely affected or involved in a claim pending before the Board.

Wherefore, plaintiff prays that the Court issue a preliminary restraining order and a temporary injunction to be made pemanent on final hearing:

(1) Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722 before the National Adjustment Board, Third Division, upon D. A. Shears, 708 North Howard Street, Robinson Illinois and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets Cincinnati, Ohio, as required by § 3(j) of the Railway Labor Act [45 U. S. C. A., § 153(j)];

(2) Restraining and enjoining the defendants herein, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio;

or, in the alternative,

(3) Restraining and enjoining the defendants, and each of them, from persisting in their refusal to serve notice of said claim upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets Cincinnati, Ohio;

(4) Restraining and enjoining the defendants, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon D. A. Shears, 708 North Howard Street, Robinson, Illinois, and upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio;

and plaintiff further prays that on final hearing of this cause it may have judgment for the costs suffered as a result of the wrongful acts of the defendants hereinbefore referred to

[fol. 50] and for such other and further relief as in equity and good conscience to the Court shall seem meet.

Respectfully submitted, Illinois Central Railroad Company, by E. H. Hallmann, Manager of Personnel.

Duly sworn to by E. H. Hallmann. Jurat omitted in printing.

[fols. 51-64] In The United States District Court

Motion to Dismiss—Filed June 30, 1953

Comes now the defendants National Railroad Adjustment Board, Third Division, as an agency created by the Railway Labor Act (45 U. S. C. 151, et seq.) and Donald F. McMahon, acting as referee and member of National Adjustment Board, Third Division, by direction of the National Mediation Board and the United States of America, the latter being the real party in interest under the Railway Labor Act, and on which service was made in accordance with Rule 4(d) (4) and (5) of the Federal Rules of Civil Procedure, by their undersigned attorneys, acting under the direction of the Attorney General and move the Court as follows:

1. To dismiss the action because the complaint on its face shows that it is prematurely brought.

2. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted, in that it appears on the fact of the complaint that (a) the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees have actual notice of the pendency of the proceeding before the National Railroad Adjustment Board, Third Division, entitled "The Order of Railroad Telegraphers *vs.* Illinois Central Railroad Company, Docket No. TE-5722," (b) plaintiff has adequate remedies, administrative and judicial, to reach the alleged wrong with respect to which it complains (c)

plaintiff is not threatened with any irreparable injury arising out of any action of the defendants herein.

Otto Kerner, Jr., United States Attorney; ——, ——, Assistant United States Attorney; James E. Kilday, Frank F. Vesper, Special Assistants to the Attorney General.

[fols. 65-66] IN THE UNITED STATES DISTRICT COURT

Transcript of Proceedings—Filed July 15, 1953

had in the above-entitled case taken before the Hon. Michael L. Igoe, one of the Judges of said Court, without a jury, in his court room in the United States Court House at Chicago, Illinois, on Friday, July 3, 1953, at 10:00 o'clock a. m.

APPEARANCES

Mr. Herbert J. Deany, Mr. John W. Foster, and Mr. Charles I. Hopkins, Jr., Representing the Plaintiff.

Hon. Otto Kerner, Jr., United States District Attorney, by Mr. John P. Lulinski, Asst. Dist. Atty., Representing the United States of America.

Messrs. Schoene and Kramer, by Mr. Milton Kramer, and Mr. Mozart G. Ratner, Representing Order of Railroad Telegraphers, and the Five Labor Members of the Board.

Messrs. Sidley, Austin, Burgess & Smith, by Mr. Kenneth F. Burgess, Mr. Douglas F. Smith, Mr. Robert Thomas, and Mr. Walter J. Cummings, Jr., Representing Defendants William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley, and J. E. Kemp.

[fols. 67-74] Mr. Kramer: We admit some and deny some and allege additional facts.

The Court: What is that?

Mr. Kramer: Allege actual knowledge by the other party. We allege the existence of the fact the other party is governed by a contract of his own.

The Court: As far as the actual knowledge is concerned, I don't think that makes any difference.

Mr. Deany: That is not controverted, the actual knowledge of the Clerks.

[fol. 75] Mr. Kramer: The same as to paragraph 5 but in addition in paragraph 5 on the top line of page 6 they say:

"—of the proceeding is a denial of due process of law—"

I think there should be inserted: to whom it is a denial——

Mr. Foster: It is a denial of due process to the one occupying the job at Palestine, and to the clerks' organization of which he is a member.

The Court: That is what they are talking about.

Mr. Kramer: If that is what it means, I think it should be explicit, if that is a denial of the individual's rights.

The Court: That is what they say. They are referring to the denial of the individuals or the organization.

[fols. 76-79] Mr. Kramer: Let it be understood then that is the meaning.

The Court: Yes, sir.

[fol. 80] In the United States District Court

Findings of Fact and Conclusions of Law—July 3, 1953

This cause coming on to be heard on plaintiff's motion for a mandatory order requiring defendants to forthwith serve notice of a proceeding before the Third Division, National Railroad Adjustment Board, upon the employees involved in said proceeding, and the court having considered the verified amended complaint heretofore filed in this case, the answers filed by some individual defendants and the verified exhibits attached thereto and the answer of the intervening defendant, The Order of Railroad Telegraphers motions to dismiss and memorandum briefs filed in support thereof and in opposition thereto, and the arguments of counsel, does find the facts and does order, adjudge and decree as follows:

Findings of Fact

1. Plaintiff, Illinois Central Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business in Chicago, Illinois, and is engaged in operating a railroad in, into and through the State of Illinois and other states.

2. Defendant National Railroad Adjustment Board, Third Division, is an administrative body created by an Act of Congress entitled "Railway Labor Act," 45 U. S. C., §§ 151 *et seq.*, and has its principal office at 220 South State Street, Chicago, Illinois.

3. Defendants William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett and J. H. Sylvester are the duly designated members of the Third Division, National Railroad Adjustment Board, and said Board has its principal office and place of business in Chicago, Illinois.

4. Defendant Donald F. McMahon is a referee selected by the National Mediation Board pursuant to § 3, First (1) of the Railway Labor Act [45 U. S. C., § 153, First (1)] and assigned to the Third Division of the Board, where he acts as a member thereof for the purpose of making an award in certain cases before the Third Division in which [fol. 81] said Division has been unable to reach a decision. One of such cases to which defendant Donald F. McMahon is assigned is Docket No. TE-5722.

5. Said Docket No. TE-5722 is a proceeding instituted by the Order of Railroad Telegraphers against plaintiff herein, entitled "The Order of Railroad Telegraphers *vs.* Illinois Central Railroad Company," which proceeding involves the employment rights of certain employees in and to a position at Palestine, Illinois. The position is presently filled by D. A. Shears of 708 North Howard Street, Robinson, Illinois, who is a member of the craft represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The employment rights of the said D. A. Shears and the members of the craft represented by the Clerks will necessarily be affected and are involved in the proceeding pending before the Third Division of the Adjustment Board.

6. Plaintiff herein has filed a "submission" with the Board which is in the nature of an answer to the complaint of the Telegraphers specifically setting forth, among other things, that the position involved was at that time occupied by William E. McDaniel, a clerk, that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on plaintiff's property and in the railroad industry generally, and that the claim was in

reality one between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case.

7. Notice of the proceeding before the Third Division has not been served upon D. A. Shears, the present incumbent of the position involved, nor does it appear in the record of this proceeding that the said D. A. Shears has actual knowledge thereof.

8. Formal notice of the proceeding before the Third Division has not been served upon the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees or the constituents thereof.

9. On May 13, 1953, Docket No. TE-5722 came on for hearing before the Board, with Referee McMahon sitting as a member, at a regular session thereof. On said occasion E. T. Horsley, a defendant herein and one of the members of said Board, upon ascertaining that no notice had been given to the Clerks or to members of the craft represented by the Clerks, objected to further proceedings before the Board for the reason due notice had not been given. [fol. 82] Thereupon the public session was adjourned and the objection was considered by the regular members of the Board in executive session. In accordance with the custom and practice of the Third Division, Referee McMahon was excluded from the consideration and vote on the objection. Thereafter, on the same day, the public session was reconvened and the said E. T. Horsley announced in open session that his objection had resulted in a tie vote of the Board and was therefore lost. Referee McMahon was not requested by the Board or by any member thereof, nor did he request an opportunity, to vote on the question of notice raised by the objection although he was in attendance at the time the objection was made and at the time the announcement was made that the objection as to want of jurisdiction had resulted in a tie vote. The said E. T. Horsley, in the presence of Referee McMahon, objected to further proceedings in Docket No. TE-5722 until the Board had complied with the mandate of § 3, First (j) of the Railway Labor Act with reference to the giving of notice to the employees involved. Notwithstanding said objection and the requirement of the statute, the hearing was resumed on said date with the acquiescence of the referee.

10. Plaintiff herein has been informed in writing by the General Chairman of the Clerks that in the event the employment rights of members of the Clerks are adversely affected by the claim filed in Docket No. TE-5722, the Clerks will present and prosecute to the fullest possible extent a claim against plaintiff based upon the same employment rights as are involved in the proceeding before the Board.

11. The Third Division of the National Railroad Adjustment Board has for several years continuously pursued, and continues to pursue, a custom and practice of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if said individuals have not been formally served with notice of the proceeding.

12. Section 3, First (j) of the Railway Labor Act provides:

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

[fol. 83] 13. The cause of action here asserted by plaintiff is one arising out of an Act of Congress regulating commerce, and the court has jurisdiction of the parties and the subject matter of said cause under § 1337, Title 28, U. S. Code, and venue is properly in this court.

Conclusions of Law

Under the foregoing findings of fact, the Court concludes that:

1. The cause of action here asserted by plaintiff is one arising out of an Act of Congress Regulating Commerce; and the Court has jurisdiction of the parties and subject-matter of said cause under Section 1337, Title 28, United States Code, and venue is properly in this Court.

2. The Amended Complaint herein states a claim upon which relief should be granted.

3. D. A. Shears, the individual presently filling the position at Palestine, Illinois, and the organization repre-

senting the craft of which said individual is a member, are "employees involved" in Docket No. TE-5722 before the Third Division of the National Railroad Adjustment Board within the meaning of Section 3 First (j) of the Railway Labor Act.

4. The Third Division, National Railroad Adjustment Board, in failing to give due notice of any and all hearings or proceedings in said Docket TE-5722 has failed and neglected to accord the individual presently filling the position at Palestine, Illinois, which is in controversy in said Docket, and the organization representing the craft of which he is a member, due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

5. The custom and practice of the National Railroad Adjustment Board, Third Division, of denying to individuals and organizations involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if they have not been formally served with notice of the proceeding is a denial of due process of law in contravention of the Fifth Amendment.

6. The failure of the Third Division, National Railroad Adjustment Board, to serve notice of the hearings or proceedings in Docket No. TE-5722 upon the individual presently filling the position in controversy and upon the [fol. 84] organization representing the craft of which he is a member, is a dereliction of the duty imposed upon said Board by the mandatory requirements of Section 3 First (j) of the Railway Labor Act.

7. The Railway Labor Act imposes upon the various Divisions of the National Railroad Adjustment Board the duty of serving notice of any proceeding before it upon all employees involved irrespective of whether such employees are members of the craft or class filing the claim with the Board.

8. The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power.

9. Plaintiff has no adequate remedy at law and will suffer irreparable harm and injury unless defendants are required to comply with the provisions of the Railway Labor Act. The failure of the Board to serve the required notice will involve plaintiff in multifarious litigation. The equity powers of this Court are adequate to afford the relief herein sought by means of a mandatory injunction and should be exercised in the circumstances herein referred to.

10. This cause does not involve a labor dispute within the meaning of the Norris-LaGuardia Act and this Court has not been deprived of jurisdiction to grant the relief requested herein.

11. The motion of the defendant, National Railroad Adjustment Board, Third Division, and of Donald F. McMahon as Referee and member of the National Railroad Adjustment Board, Third Division, is not well founded in law and is denied.

12. The motion of the defendants, J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes and R. Sarchett, to dismiss is not well founded in law and is denied.

13. A preliminary injunction should be issued enjoining the defendants from further proceeding in Docket No. TE-5722, unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight [fol. 85] Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, Ohio, and permit said persons to participate in proceedings before the Board in Docket No. TE-5722.

PRELIMINARY INJUNCTION

This matter coming on to be heard on plaintiff's application for a preliminary injunction and the Court having considered the verified Amended Complaint heretofore filed in this case, the answers filed by some individual defendants and the verified exhibits attached thereto, and the answer of the intervening defendant, The Order of Railroad Telegraphers, motions to dismiss and memorandum briefs filed in support thereof and in opposition thereto, and the arguments of counsel and the entire record herein, and the

Court having made findings of fact and conclusions of law as above set forth,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the motion to dismiss heretofore filed herein by the defendants, National Railroad Adjustment Board, Third Division, as an agency created by the Railway Labor Act (45 U. S. C. 151, et seq.) and Donald F. McMahon, acting as Referee and member of National Railroad Adjustment Board, Third Division, be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion of the defendants, J. W. Whitehouse, G. Orndorff, R. Sarchett, and Claude R. Barnes, to dismiss, be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the defendants, National Railroad Adjustment Board, Third Division, and William H. Castle, R. M. Butler, Claude R. Barnes, C. P. Dugan, J. W. Whitehouse, E. T. Horsley, J. E. Kemp, G. Orndorff, R. Sarchett and J. H. Sylvester, as members of and constituting the Third Division of said Board, and Donald F. McMahon, acting as Referee and Member of said Board by direction of the National Mediation Board, are enjoined from proceeding in Docket No. TE-5722 before the National Railroad Adjustment Board, Third Division, unless and until they give formal notice to D. A. Shears, 708 North Howard Street, Robinson, Illinois, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 701 Brotherhood Building, Court and Vine Streets, Cincinnati, [fols. 86-88] Ohio, and permit said persons to participate in the proceedings in said Docket No. TE-5722.

It is further ordered that said preliminary injunction is conditioned upon the filing by the plaintiff within five days of bond in the sum of Five Hundred Dollars ($500.00).

And it is further Ordered that said preliminary injunction be and it hereby is stayed pending appeal to be filed thirty (30) days after the date hereof.

Enter: Igoe, Judge.

July 3, 1953.

[fols. 89-103] IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 30, 1953

Notice is hereby given that J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes and R. Sarchett, and The Order of Railroad Telegraphers, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order enjoining the defendant members of the Third Division of the National Railroad Adjustment Board from proceeding in Docket No. TE-5722 before said Board, unless and until they give formal notice to D. A. Shears, and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and permit said person to participate in the proceedings in said Docket No. TE-5722, entered in this action on July 3, 1953.

Mozart G. Ratner, Milton Kramer, Attorneys for Appellents, J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude Barnes, R. Sarchett and The Order of Railroad Telegraphers.

Jacobs, Kamin & Ratner, 201 N. Wells Street, Chicago 6, Illinois; Schoene & Kramer, 1625 K Street, N. W., Washington 6, D. C.

At a regular term of the United States Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and fifty-three, and of our Independence the one hundred and seventy-eighth.

Illinois Central Railroad Company, *Plaintiff-Appellee,* 10959 *vs.* J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, R. Sarchett and The Order of Railroad Telegraphers, *Defendants-Appellants,* and William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to wit: On the second day of December, 1953, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 2, 1953.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Illinois Central Railroad Company, *Plaintiff-Appellee,*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10959	*vs.*	
J. W. Whitehouse, *et al.,* *Defendants-Appellants,* and William H. Castle, *et al.,* *Defendants-Appellees.*		

Now this day come the parties by their Counsel, and this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Mr. Milton Kramer, counsel for appellants, and by Mr. John W. Foster, counsel for appellee, Illinois Central Railroad Company, and by Mr. Walter J. Cummings, Jr., counsel for appellees, Carrier Members, National Railroad Adjustment Board, Third Division, and the Court takes this matter under advisement.

And afterwards, to-wit: On the nineteenth day of March, 1954, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10959 OCTOBER TERM, 1953, JANUARY SESSION, 1954

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff-Appellee,
vs.
J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS,
Defendants-Appellants,
and
WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY and J. E. KEMP,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 19, 1954.

Before MAJOR, *Chief Judge*, DUFFY and SWAIM, *Circuit Judges.*

MAJOR, *Chief Judge.* The Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) filed a claim before the National Railroad Adjustment Board, Third Division (hereinafter referred to as the Board), against the Illinois Central Railroad Company (hereinafter referred to as Carrier), asserting that an agreement between the Carrier and Telegraphers covered the work of a position on the property of the Carrier in Palestine,

Illinois, which was then being performed by D. A. Shears, a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks).

After this claim was filed with the Board, the Carrier was informed in writing by the Clerks that in the event the employment rights of the present incumbent of the position in question are adversely affected by the claim filed by the Telegraphers, the Clerks will present and prosecute a claim against the Carrier based upon the same employment rights which are involved in the Telegraphers' proceeding.

Thereafter, the Carrier filed its submission with the Board, stating that the employment in controversy was plain, ordinary clerical work of the type customarily performed by clerical personnel on the Carrier's property and in the industry generally, and that the claim was in reality a dispute between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case. The ten regular members of the Board, consisting of five carrier members and five labor members, deadlocked on the merits of the Telegraphers' claim, following which a Referee was appointed by the National Mediation Board, pursuant to Sec. 3 First (l) of the Railway Labor Act (45 U. S. C. A. Sec. 153 First (l)), to act as a member of the Board for the purpose of making an award.

On May 13, 1953, the Telegraphers' claim came before the Board for hearing, at which time a question was raised by Mr. Horsley, a carrier member, that no notice had been served on the Clerks or on members of the craft represented by the Clerks "who were directly involved in the claim." A vote was taken on the question of giving notice, which resulted in a tie, the five carrier members voting to give notice and the five labor members against. The Referee abstained from voting. Mr. Horsley thereupon, the said Referee being present, objected to further proceedings in said matter until the Board had complied with Sec. 3 (j) of the Railway Labor Act relative to the giving of notice to parties involved. Notwithstanding this objection, the hearing was resumed, with the Referee present and acquiescing in such action.

On May 22, 1953, the Carrier filed the instant action against the Board, each of the ten individual members of

the Board, and Donald F. McMahon, acting as Referee and member of the Board by direction of the National Mediation Board. The complaint recited in detail the facts outlined above and alleged that "the Board does not intend to and that it will not give the statutory notice to the Clerks and to the said D. A. Shears, or to either of them;" and that further demand that the Board do so would be unavailing and that the Board would hold further proceedings in the matter without giving such notice "unless such action is enjoined" by the court.

The complaint also alleged that "for several years last past the Board has continuously and deliberately pursued, and continues to pursue, a custom and practice of denying the right of participation in any claim pending before it to any party or employee involved but not formally served with notice of the proceeding. That said custom and practice excludes employees and unions other than the one filing the claim with the Board and those seeking to represent them from participating in hearings before the Board." This allegation is supported by the affidavit of a carrier member and is not disputed.

The complaint prayed for "a preliminary restraining order and a temporary injunction to be made permanent on final hearing: (1) Directing the defendants, and each of them, to forthwith serve or cause to be served due notice of the claim filed against plaintiff by the Order of Railroad Telegraphers in Docket No. TE-5722," upon Shears and the Clerks "as required by Section 3 (j) of the Railway Labor Act" (45 U. S. C. A. Sec. 153 (j)), and "(2) Restraining and enjoining the defendants herein, and each of them, from proceeding with any disposition of said claim until such due notice has been served upon" Shears and the Clerks.

Telegraphers as an intervening defendant filed an answer in opposition to the Carrier's motion for a preliminary injunction. This answer alleged lack of jurisdiction by the court to grant injunctive relief for the reason that the judicial review of awards of the Board provided by the Railway Labor Act in actions to enforce is exclusive; that the Carrier has not exhausted its administrative remedies; that the Board, with the Referee sitting as a member thereof, has not made, but will make unless enjoined, a final determination of the Carrier's contentions,

including its contention that any award in favor of Telegraphers would be invalid unless notice is given to the Clerks; that the complaint is premature because the Referee may decide Telegraphers' claim in favor of the Carrier, either on the question of notice or on the merits, in which case the Carrier cannot be injured; that, if the case should be decided in favor of Telegraphers, the Carrier, if correct on its contention as to notice, will have an adequate defense to any suit for enforcement of the award, which defense constitutes an adequate remedy at law; that the Clerks has its own contract with the Carrier governing the performance of work by members of that craft and it is, therefore, neither a necessary nor a proper party in the proceeding before the Board, and, finally, Telegraphers alleged that the record shows that the Clerks had actual knowledge of the pendency of the claim before the Board and that such knowledge dispenses with the necessity of giving formal notice. Telegraphers, therefore, asked that the motion of the Carrier for a preliminary injunction be denied.

The five labor members of the Board also filed an answer, objecting to the granting of a preliminary injunction as sought by the Carrier for substantially the same reasons as those asserted by the Telegraphers, and also filed a motion to dismiss the complaint for reasons similar to those set forth in their answer. The carrier members of the Board answered the complaint and generally agreed with the position of the Carrier as set forth in its complaint.

The Board, the Referee and the "United States of America, the latter being the real party in interest under the Railway Labor Act, and on which service was made in accordance with Rule 4 (d)(4) and (5) of the Federal Rules of Civil Procedure," filed a motion to dismiss the complaint on the grounds that (1) the complaint shows on its face that it is prematurely brought, (2) the complaint fails to state a claim upon which relief can be granted, and (3) plaintiff is not threatened with irreparable injury arising out of any threatened action by the Board.

We discern no substantial dispute as to the facts; at any rate, there is no attack upon the findings as made by the district court, which are predicated upon the pleadings and numerous exhibits attached thereto. The court specifically found that the proceeding before the Board involved

the employment rights of certain employees to a position then held by D. A. Shears, a member of the Clerks' union, and that Shears and the members of the craft represented by the Clerks would be affected by and are involved in the Board proceeding. The court found that no notice of the proceeding had been served upon Shears, that there was nothing in the record to show that he had actual knowledge thereof and that no formal notice had been served upon the Clerks' union or the constituents thereof. The court found: "The Third Division of the National Railroad Adjustment Board has for several years continuously pursued, and continues to pursue, a custom and practice of denying to individuals involved in disputes before the Board their statutory and constitutional rights to participate in the hearings before the Board if said individuals have not been formally served with notice of the proceeding." And the court concluded that such custom and practice "is a denial of due process of law in contravention of the Fifth Amendment," and "The notice required by Section 3 First (j) of the Railway Labor Act is jurisdictional and if the Board fails to comply with this Section of the statute it is acting without statutory authority. The National Railroad Adjustment Board may not assert its general power under the Railway Labor Act and at the same time disregard the essential conditions imposed upon it by Congress for the exercise of such power."

The court denied the motion of the Board and the labor members thereof to dismiss the complaint, and by order enjoined the Board, its members and the Referee from proceeding in Docket No. TE-5722 (this being the Telegraphers' claim in controversy) "unless and until they give formal notice" to D. A. Shears and the Clerks and "permit said persons to participate in the proceedings in said docket."

The appeal is brought to this court by the labor members of the Board and the Telegraphers (designated in the caption of this opinion as defendants-appellants). There was no appeal by the carrier members of the Board (designated in the caption as defendants-appellees), and no appeal by the United States, the real party in interest under the Railway Labor Act.

The issues raised in this court are in substance the same as those pleaded by Telegraphers in its answer to the complaint, heretofore set forth, and need not be repeated. The

explosive nature of the instant controversy revolved around Sec. 3 First (j) of the Railway Labor Act, which provides: "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

There can hardly be any doubt, as the district court found, but that the Clerks and Shears were "involved" parties within the terms of this provision. And it is hardly open to question but that an award made by the Board in the absence of "due notice" to the "involved" parties, with an opportunity accorded to be heard, is void and that its enforcement may be enjoined for that reason. *Nord, et al.* v. *Griffin*, 86 F. 2d 481; *Hunter, et al.* v. *Atchison, T. & S. F. Ry. Co., et al.*, 171 F. 2d 594; same title and case on a second appeal, 188 F. 2d 294, and *Missouri-Kansas-Texas R. Co., et al.* v. *Brotherhood of Ry. and S. S. Clerks, et al.*, 188 F. 2d 302. (These are all decisions by this court.) Further, it is not disputed that the Board refused to give notice to the Clerks and Shears and that it set the case and was about to proceed to a hearing and decision on the merits. Such was the situation when the complaint was filed which resulted in the order under attack, by which the Board, including the Referee, was restrained from proceeding further, in the absence of formal notice to the Clerks and Shears.

As already stated, neither the Board nor the United States has appealed from the order now under attack by Telegraphers, which is understandable in view of the position which they took in the court below. Their motion to dismiss was predicated in the main upon the premise that the action was premature and that the plaintiff was not threatened with irreparable injury. In their brief, however, it was conceded that any award to the Telegraphers entered in the absence of notice to the Clerks and Shears would be void and unenforceable.

The carrier members of the Board attached to their answer the findings and conclusions of the United States District Court for the Northern District of Illinois (Judge Barnes) in civil action No. 51 C 238, entitled "*Allain, et al.* v. *National Railroad Adjustment Board Third Division,*

et al.," where an order of the Board was held void and its enforcement restrained because of its failure to give notice to "employees involved," as required by Sec. 153 First (j) of the Act. Also attached to the answer is a letter written by the Department of Justice, dated May 11, 1951, and directed to the Secretary of the Board, Third Division. The letter states in detail the reason for the refusal of the Attorney General to represent the Board, the substance of which is that it is because of the Board's refusal to give notice to involved parties. The letter states, "It is, therefore, our opinion that these employees were deprived of their position without regard to their constitutional rights and it is not thought that this Department should defend an order having that effect." In support of that position, the Department refers to many cases, including those of this court above cited, and summarizes the situation as follows: "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf."

Telegraphers in its brief states that the action is premature because "The Board's decision may be in accord with the railroad's contentions." Closely allied with this issue is that the district court was without jurisdiction to grant an injunction "because the railroad has failed to exhaust its administrative remedies." Relative to the former contention, it is argued that the Carrier "may never be hurt by the allegedly improper procedure the Board is following" because the Board, if permitted to decide, "may decide for the railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the railroad." It is asserted that the Board, with the Referee sitting as a member, may decide the issues favorably to the railroad and that in fact the Board has, with the Referee sitting as a member, denied a number of awards because of the lack of notice to third parties.

This brings us at once to the contention advanced by the Carrier that the Referee is without authority to participate in a decision as to whom notice shall be served upon but that such determination must be made by the Board as originally constituted. No authority is cited and we know of none where this question has been decided but we are

convinced from our study of the statute that the contention is sound. The first duty or obligation imposed upon the Board after a claim has been filed is that contained in (j) (heretofore quoted). That paragraph contains the unequivocal command that the Board "shall give due notice of all hearings." At that stage of the proceeding, it appears plain that there is no Referee and there could not be, by reason of the subsequent provisions which define the conditions and circumstances under which a Referee may be brought into the proceeding.

Paragraph (l) provides that "upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members," such division shall agree and "select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award." In case the members of the division are unable to agree upon and select a referee then such fact may be certified to the Mediation Board which shall select and name the Referee, "to sit with the division as a member thereof and make an award." It appears certain that paragraph (l), providing for the selection of a Referee, presupposes that the Board has complied with the "due notice" provision of paragraph (j). Moreover, the Referee, whether selected by members of the division or by the Mediation Board, is authorized to sit as a member of the Board only for the purpose of "making an award." His authority to sit as a member for that purpose bears no relation to the obligation imposed upon the Board to give "due notice." That the Board is without power to proceed until it has complied with the "due notice" requirement of paragraph (j) is evidenced by the fact that an award made in the absence of such notice is void, and a study of the relevant provisions of the statute leaves little, if any, room for doubt but that the selection of a Referee is authorized only in the event that the division is deadlocked or unable to agree on the making of an award. In such case, a Referee is selected evidently to break the deadlock or, in the language of the statute, "to sit as a member and make an award." It appears that the Board recognized this limited authority of the Referee because he did not participate or at any rate did not vote on the notice controversy.

Telegraphers in its brief further states, "We cannot assume that the Board will make an erroneous decision.

In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision," and "To be sure, the Board might make a decision that would turn out, on appropriate judicial review, to be wrong. But the mere possibility of an erroneous decision is hardly the basis for enjoining administrative action." This argument, if it can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving "due notice" and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than restrain the Board from proceeding until it has complied with the statutory command. When it does that, a hearing may be had and a decision rendered which may be the subject of attack in such manner as is provided for by law.

The only case called to our attention where a restraining order has been issued under circumstances similar to those here is that of *Townsend et al.* v. *National Railroad Adjustment Board, Fourth Division, et al.*, No. 53-C-2287, decided by the United States District Court for the Northern District of Illinois (Judge Campbell) on January 6, 1954. In that case, it was the Fourth Division which refused to give notice under Sec. 153 (j), and the court issued an order in form almost identical to that of the present case. There, as here, the jurisdiction or authority of the court was under attack. The court in an unpublished opinion stated: "Congress has commanded in express terms that the several divisions of the NRAB 'shall give due notice of all hearings to the employee or employees * * involved in any disputes submitted to them;' but Congress has not expressly defined a remedy for employees involved in a dispute who have not been given notice. If a district court lacked jurisdiction to order that notice be given, the 'right' to notice conferred by Section 3 would become mere verbiage, a right without a remedy. Congress could not have intended that result." We think that is a sound statement. True, it was made in a case where the relief sought was by an ag-

grieved employee rather than by the Carrier, as here, but even so, we discern no difference insofar as the jurisdictional issue is concerned.

Moreover, it is generally held that aggrieved parties may under some circumstances restrain action by the Board without an exhaustion of administrative remedies. Such was the holding in the decisions of this court heretofore cited. In *Order of Railway Conductors of America et al.* v. *Pitney et al., etc.*, 326 U. S. 561, it was recognized that a court of equity might interfere in a proper case. True, the court there held that the case presented was not proper, but in doing so stated (page 567), "under these circumstances the court should exercise equitable discretion to give that agency [the Board] the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then." Here, the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute. Nevertheless, we are urged to hold that it should be permitted to proceed to a hearing and a decision on the merits as a prerequisite to the right of a court of equity to interfere. Thus, a court before it can interfere must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic. And, as already pointed out, we are not aware of any administrative remedy for the review of an award made by the Board. The only remedy is an attack in court upon such an award either in defense of an enforcement action or by injunction to restrain its enforcement.

We conclude that the court had jurisdiction and that the action was not premature. Closely aligned with these issues and partly covered by our discussion relative thereto is the contention that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits. We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Car-

rier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights. The reasoning in *Kirby et al.* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799, is pertinent, wherein the court stated: "Until the statutory requirements are met, it [the Board] has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

We think the contention that the action must fail because it is shown that the Clerks had actual notice and that it was the representative of Shears is likewise, under the circumstances, without merit for a number of reasons. It is true that actual notice has been recognized as sufficient in some of the cases where the attack was upon the validity of the award. Here, however, it is sought to be utilized as a justification for the Board's refusal to comply with the statute. More than that, under the statute the employee (Shears) was entitled to notice the same as the Clerks, and it is not shown that he had notice of any kind. Of more importance, however, is the fact that actual notice would have served no purpose insofar as it afforded protection to the Clerks or Shears of either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with that kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. But it is asserted that the Clerks and Shears had no desire to be heard. Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of

serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.

Telegraphers argues, and we assume it is the Board's position, that the Board is without authority to consider two agreements simultaneously and for that reason notice was not required to be served upon the Clerks or Shears. That contention has been rejected by this court in *Missouri-Kansas-Texas R. Co. et al.* v. *Brotherhood of Ry. & S. S. Clerks et al.*, 188 F. 2d 302. Referring to *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, this court stated (page 306): "That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.'"

Lastly, we reiterate that this is not an action to review an erroneous decision of the Board. It is only to require the Board to perform its statutory duty as a prerequisite to its authority to proceed. While it is labeled as an injunctive proceeding, it is more in the nature of mandamus. At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard. The court in *Wilbur* v. *United States*, 281 U. S. 206, 218, made a relevant pronouncement. There the court stated: "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

The order appealed from is

AFFIRMED.

SWAIM, *Circuit Judge*, Dissenting. I think that the action in the District Court was premature because the Board had not finally acted on the matter and that, until such final action, the Carrier had not exhausted the administrative remedies provided by the Railway Labor Act, 45 U. S. C. Sec. 151 *et seq.* As the Supreme Court said in *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767: "The doctrine [of first resorting to administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion, and, correlatively, of awaiting their final outcome before seeking judicial intervention." This would seem to clearly negative the power of the courts to enjoin the *making* of an award. The Railway Labor Act expressly sets forth the reasons for its enactment. The fifth stated purpose is: "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U. S. C. Sec. 151 (a) (5).

If either party to a claim before the Board were privileged to go into court and enjoin further proceedings by the Board each time the Board decided some preliminary matter or took, or failed to take, some procedural step to which the complaining party objected, there would be neither "prompt" nor "orderly" settlement of such disputes, and the above quoted fundamental purpose of the Railway Labor Act would be defeated.

But the Carrier insists that it has been informed in writing by the Clerks that, in the event the rights of members of the Clerks' organization are adversely affected by an award in Docket No. TE-5722, the claim of the Telegraphers, the Clerks will present and prosecute a claim against the Carrier on behalf of any member of the Clerks so affected; that if the Board should proceed with the disposition of the claim of the Telegraphers without serving notice on the Clerks and should find that the work here in dispute belongs to the Telegraphers, such a finding would not adjudicate the rights of the Clerks and would not preclude the Clerks from prosecuting an independent claim under the Railway Labor Act against the plaintiff; that if the Board should then decide such a claim by the Clerks to be valid, the Carrier would be

forced to make payments to both organizations for the same work, although the services of the members of only one of the organizations were actually used; and that the Carrier by such action by the Board would suffer irreparable injury and damage which would continue unless the defendants were enjoined from proceeding without complying with Section 3 First (j) of the Act, 45 U. S. C. Sec. 153 First (j).

I think none of these reasons assigned by the Carrier justified the bringing of this action prior to an award and order by the Board. It is to be noted that neither the Clerks nor Shears are parties to this action. The only party complaining of the action of the Board is the Carrier. If we assume, *arguendo*, that Section 3 First (j) of the Act required notice to the Clerks and to Shears, as the majority opinion holds, it is clear from the record that the Clerks had actual notice, and that the Clerks' organization intends to take whatever action it may consider necessary to protect the rights of Shears under the Clerks' contract with the Carrier. This plainly indicates that there is no misunderstanding between the Clerks and Shears, the individual, and that the Clerks' organization will represent Shears. We are not confronted here with the case of an individual working without the protection of a collective bargaining agreement with the Carrier and without representation of a labor organization.

The Carrier was, of course, thoroughly familiar with the scope rules of its contracts with both the Telegraphers and the Clerks. Since it was a party to both of these contracts, the Carrier possessed copies of the contracts which it could present to the Board with its suggestions and evidence, if any, as to how the scope rule of each contract should be interpreted and applied. This Carrier and all persons acquainted with the personnel of the Board and the methods of its operation know that in a case such as this every possible argument in favor of the Carrier's contentions will be made before the Board regardless of whether the Clerks are or are not made parties to the proceeding there. It certainly was not necessary to the proper presentation of the Carrier's defense against the Telegraphers' claim that the Clerks' organization or Shears be made a party to the proceeding.

The Carrier's claim to substantial and irreparable damage can only be predicated on an invalid decision, adverse

to the Carrier as to the final award and order by the Board.

If the final award and order on the Telegraphers' claim is in favor of the Carrier, the Carrier, of course, suffers no possible damage, regardless of the decision of the Board as to participation by the Clerks in the proceeding and regardless of whether the Clerks' organization was given notice of the hearing or was permitted to participate in the proceedings before the Board on the Telegraphers' claim. At this stage of the proceedings before the Board we have no possible way of knowing what the final decision and award will be, but we must assume that the Board in arriving at its decision will be governed by the contracts and the evidence before it, and that all relevant evidence will be properly submitted to it and received by it.

The real problem facing the Carrier here, according to Paragraph XII of its complaint, is that the Board may make an award, first, in favor of the Telegraphers on their claim, and then make another independent award in favor of the Clerks involving the same work; and that this will result in the Carrier's having to pay members of both organizations for doing the same work although the services of the members of only one organization are actually used. Here, again, we must assume that in the making of any award the Board will properly interpret and apply the Carrier's contracts with the two organizations. If there is no ambiguity in either contract and both contracts clearly include the same work, and we may not assume that the Board would make awards in favor of both the Telegraphers and the Clerks unless both contracts do cover the work, I see no alternative for the Carrier except to let members of one craft do the work for pay, and for the Carrier to pay damages to the members of the other craft for the breach of that contract. Neither the Board nor the courts may properly change either of two valid, unambiguous contracts made by the Carrier in order to avoid the consequences to the Carrier of having made conflicting contracts with the two crafts.

The complaint does not allege that the contracts are ambiguous and since the two contracts have not been made a part of the record in this case we have no way of knowing whether there is any ambiguity in the scope rule of either contract, or whether they are so clear and

definite that they are not subject to interpretation. The mere fact, if it be a fact, that both contracts describe the same work does not mean that they are ambiguous. They are separate and independent contracts. If the contracts are not ambiguous neither the Board nor any court could do other than apply them as written. As said in *Thomas v. New York, Chicago & St. Louis R. Co.*, 6 Cir., 185 F. 2d 614, 617: "While the Board under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

And on the same day, to-wit: On the nineteenth day of March, 1954, the following further proceedings were had and entered of record, to-wit:

Friday, March 19, 1954.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

Illinois Central Railroad Company, *Plaintiff-Appellee,*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10959	*vs.*	
J. W. Whitehouse, *et al.*, *Defendants-Appellants,* and William H. Castle, *et al.*, *Defendants-Appellees.*		

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

And afterwards, to-wit: On the twenty-eighth day of May, 1954, there was filed in the office of the Clerk of this Court, a Designation of Record, which said Designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Illinois Central Railroad Company, *Plaintiff-Appellee,* vs. J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, R. Sarchett and The Order of Railroad Telegraphers, *Defendants-Appellants,* and William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp, *Defendants-Appellees.*	No. 10959.

DESIGNATION OF RECORD ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come the Defendants-Appellants, by their attorneys, Jacobs, Kamin and Ratner and Schoene & Kramer, and designate the following portions of the record and proceedings in this Court as the record to be certified to the Supreme Court of the United States for the purpose of proceedings on petition for a writ of certiorari to be filed by Defendants-Appellants:

1. Printed transcript of record in Case No. 10959.

2. Order of the Court taking Case No. 10959 under advisement.

3. Opinion of the Court dated March 19, 1954.

4. Judgment of the Court.
5. This designation.

Jacobs, Kamin and Ratner,
Schoene & Kramer,
Attorneys for Defendants-Appellants, J. W. Whitehouse, et al., and The Order of Railroad Telegraphers.

Jacobs, Kamin and Ratner,
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Washington 6, D. C.

Endorsed: Filed May 28, 1954. Kenneth J. Carrick, Clerk.

[fol. 127] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, et al., Petitioners.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, et al.

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
JUN 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT and THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY and J. E. KEMP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1953

No.

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT and THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY and J. E. KEMP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. W. Whitehouse, G. Orndorff, J. H. Sylvester, Claude R. Barnes, R. Sarchett, and The Order of Railroad Telegraphers pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered by a divided Court on March 19, 1954. R. 121, 124.

OPINIONS BELOW

The District Court did not issue an opinion. Its Findings and Conclusions are in the record. R. 80, 83. The opinion of the Court of Appeals (R. 109) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954. R. 124. The jurisdiction of this Court is invoked under Section 1254(a) of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether, while the National Railroad Adjustment Board is considering a claim of a labor organization that a carrier has violated a collective bargaining agreement, a District Court has jurisdiction to enjoin it from proceeding further with such consideration on the ground that it has not followed allegedly proper procedure.

2. Whether, while the National Railroad Adjustment Board is considering a claim of a labor organization that a carrier has violated a collective bargaining agreement, a District Court may properly enjoin it from proceeding further with such consideration on the ground that it has not followed allegedly proper procedure.

3. Whether, while the National Railroad Adjustment Board is considering a contention of a carrier that a claim should not be sustained because of the absence of allegedly requisite parties, a District Court has jurisdiction to enjoin the Board from giving further consideration to the claim until it has given notice to such allegedly requisite parties.

4. Whether, while the National Railroad Adjustment Board is considering a contention of a carrier that a claim should not be sustained because of the absence of allegedly requisite parties, a District Court may properly enjoin the Board from giving further consideration to the claim until it has given notice to such allegedly requisite parties.

5. Whether respondent has exhausted its administrative remedies for its contention that requisite parties are absent from a proceeding before the National Railroad Adjustment Board, prior to the final decision of the Board.

6. Whether, prior to a decision by the National Railroad Adjustment Board on a contention of the carrier that a claim should be denied because notice has not been given to allegedly requisite parties, an action to enjoin the Board from proceeding further is premature.

7. Whether, while the National Railroad Adjustment Board, with a referee sitting as a member is considering a contention that notice has not been given to "involved" parties, a District Court may enjoin further consideration of the claim on the ground that notice has not been given to "involved" parties.

8. Whether, prior to a decision by the National Railroad Adjustment Board on a contention of the carrier that a claim should be denied because the Board has not given notice to allegedly involved parties, there is a "case or controversy" between the carrier and the Board or its members.

9. Whether, if the National Railroad Adjustment Board should issue an invalid award, the defense of invalidity of the award in the statutory suit to enforce the award would be an adequate remedy to the carrier.

10. Whether a carrier is entitled to an injunction to prevent the National Railroad Adjustment Board from making an allegedly invalid award.

11. Whether the judicial remedy provided by the Railway Labor Act for challenging the validity of an award of the National Railroad Adjustment Board, by way of defense to an enforcement suit, is exclusive.

12. Whether, under Section 3, First, (j) of the Railway Labor Act, providing that the National Railroad Adjust-

ment Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes", in a dispute arising from a claim that a carrier has assigned work in violation of a collective bargaining agreement, notice is required to others than the claimants and the carrier.

13. Whether, in the event the answer to question 12 is in the affirmative, the Board is without jurisdiction to make a decision in the absence of such notice.

14. Whether, in the event the answer to question 12 is in the affirmative, actual knowledge of the proceeding by the others allegedly required to be given notice satisfies such requirement.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C., §§ 151 et seq.) are set forth in the appendix.

STATEMENT

This action was brought by the Illinois Central Railroad Company (hereinafter referred to as the "Railroad") against the National Railroad Adjustment Board, Third Division (hereinafter referred to as the "Board") and its individual members, including the referee, to enjoin the Board from making any disposition of a claim filed against the Railroad by The Order of Railroad Telegraphers (hereinafter referred to as the "Telegraphers"), until the Board should serve a notice of said claim on the the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the "Clerks") and upon an individual represented by the Clerks, and to compel said defendants to serve notice of the claim upon the Clerks and said individual. R. 5, 43, 49, 80. Preliminary and permanent relief were requested. R. 5, 49. The Telegraphers were permitted to intervene as a defendant. R. 15.

The District Court granted a preliminary injunction against the Board deciding the claim. R. 85. An appeal was taken by the Telegraphers and the members of the Board selected by the labor organizations (hereinafter referred to as the "Labor Members"). R. 89. The appellants below are the petitioners here.

Although the parties are numerous, the facts are simple. On July 1, 1951, the Telegraphers filed a claim with the Board alleging that certain work at Palestine, Illinois, subject to the contract between the Telegraphers and the Railroad, had been assigned by the Railroad other than as provided in the contract. The claim was docketed as No. TE-5722. R. 45. The work in question had been assigned to a position subject to the contract between the Clerks and the Railroad. R. 45. The Clerks advised the Railroad that while it took no position on the question whether the Telegraphers' contract covered the work, it did take the position that its contract covered the work, and if the work should be assigned other than as provided in the Clerk's agreement it would present a claim for violation of its agreement. R. 48, 82. The Railroad thereupon argued to the Board that the claim was not really against it but was a dispute between the Telegraphers and the Clerks and should be dismissed unless the two labor organizations took positions before the Board. R. 45-6, 81. The Board did not serve a formal notice upon the Clerks to appear and be heard on the Telegraphers' claim, but the record before the Board showed that the Clerks had actual knowledge of the pendency of the proceeding. R. 17, 46-7, 67.

The ten regular members of the Board divided evenly on the question whether the claim should be dismissed because the Board had not given notice to the Clerks, and pursuant to Section 3(1) of the Railway Labor Act a referee was selected to sit as an additional member of the Board and dispose of the claim. R. 17-8. When Docket No. TE-5722 came on for hearing before the Board with the Referee sitting as a member, one of the Carrier Members

objected to proceeding with the hearing on the ground that formal notice had not been given to the Clerks or to members of the craft represented by the Clerks. R. 46, 81-2. When such objection was made, one of the Labor Members, who is a vice-president of the Clerks, stated that the Clerks were not "involved" in the dispute. R. 17. Railway Labor Act, Sec. 3, First, (j) directs that notice be given to persons "involved". The consideration of the objection was in private without the participation of the Referee. R. 46, 82. Upon resumption of the open hearing, the Carrier Member who had made the objection announced that his objection had resulted in a tie vote and was therefore lost. R. 46, 82. The hearing was resumed and argument presented to the Board by both sides. R. 46, 82. While the Board, with the Referee as a member, had the case under advisement, this action was brought to enjoin the Board from making a decision until after notice is given to the Clerks. R. 45, 49.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred

1. In holding that the federal courts may interfere with proceedings of the Board prior to a final decision of the Board.

2. In holding that the District Court had jurisdiction of the subject-matter.

3. In holding that the Railroad had exhausted its administrative remedies

4. In holding that the action was not premature.

5. In not holding that there was no case or controversy between the original plaintiff and defendants.

6. In not holding that the statutorily-prescribed method of reviewing Board action is exclusive.

7. In not holding that there was lack of equity jurisdiction because the statutory method of review is adequate.

8. In holding that the referee had no authority to participate in the decision of the questions of the existence of other "involved" parties and their identity.

9. In holding that the Board was required to give notice of the proceeding before it to the Clerks and to an individual clerk.

10. In holding that in the absence of such notice the Board was without jurisdiction to make any decision.

11. In holding that actual knowledge of the proceeding by any third parties did not satisfy any requirement of notice to them.

REASONS FOR GRANTING THE WRIT

With respect to the issues pertaining to notice to the Clerks in the situation presented, the Courts of Appeals are in conflict. With respect to the remaining issues the Court below has acted contrary to the consistent holdings of this Court, and has done so in a manner that threatens to frustrate the functioning of the Railway Labor Act by interjecting the federal courts into every stage of the proceedings under that Act.

1. Failure to Exhaust Administrative Remedies.

In this case the Railroad seeks to have the Board enjoined from proceeding with the claim because it has not given notice to the Clerks. Whether notice to the Clerks is required because they are "involved" in the dispute submitted by the Telegraphers is one of the issues that the Board, with the Referee sitting as a member, must decide and will decide if not enjoined from doing so.

In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, and *Jonco*

Aircraft Corp. v. *Franklin*, 346 U.S. 11, this Court uniformly held that the continuation of administrative proceedings could not be enjoined on the ground that the administrative tribunal was without jurisdiction. In each of those cases this Court held that there could be no judicial determination of the agency's jurisdiction until the administrative proceeding was completed; if the administrative hearing or its result was invalid, it could then be judicially declared invalid. In *Yakus* v. *United States*, 321 U.S. 414, this Court held that a defendant in a criminal prosecution for violation of the price control statutes could not attack the validity of certain regulations since he had not availed himself of the administrative remedy for attacking them. It appeared that Yakus had very good grounds for attacking the regulations in an appropriate administrative proceeding, but this Court said that it could not assume that the administrative ruling would have been erroneous. See also *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, where this Court held that the very agency involved in this case, the National Railroad Adjustment Board, should be given the first opportunity to decide a question before it before the courts should intervene.

The decision below was contrary to the foregoing applicable decisions of this Court.

The failure by the Railroad to exhaust its administrative remedy was one of the reasons for which Judge Swaim dissented from the decision below. After quoting from *Aircraft and Diesel Corp.* v. *Hirsch, supra*, and discussing the purposes of the Railway Labor Act, he concluded (R. 121):

> "If either party to a claim before the Board were privileged to go into court and enjoin further proceedings by the Board each time the Board decided some preliminary matter or took, or failed to take, some procedural step to which the complaining party objected, there would be neither 'prompt' nor 'orderly' settlement of such disputes, and the above quoted fundamental purpose of the Railway Labor Act would be defeated."

2. The Action is Premature Because the Board's Decision May be in Accord With the Railroad's Contentions. There is Thus no Case or Controversy.

We had heretofore supposed that before judicial relief could properly be sought a petitioner must show that he has been or is being or is about to be hurt. In the instant case the Railroad may never be hurt by the allegedly improper procedure the Board is following. See *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 567; *Allen* v. *Grand Central Aircraft Co.*, decided by this Court May 24, 1954. If permitted to decide, the Board may decide for the Railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the Railroad. See *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, 156 F. (2d) 1 (C.A. 8, 1946), cert. den. 329 U.S. 758. To be sure, the Board might make a decision that on appropriate judicial review might be found to be wrong. But the mere possibility of an erroneous decision is not the basis for enjoining administrative action. So long as the Board is given authority to decide questions, it must have authority to decide them either way. *Pope* v. *United States*, 323 U.S. 1, 14; *Burnet* v. *Desmornes y Alvarez*, 226 U.S. 145, 147. The Board has denied a number of awards to claimants because of lack of notice to third parties. See, e.g., Awards Nos. 5432, 5433, 5599, 5600, 5627, 5644, 5741, 5865. Indeed, the Referee on the claim here involved, who was one of the defendants in the District Court, has on occasion voted to remand a claim for further proceedings for lack of notice to third parties. See Award No. 6224.

Until the Board sustains or denies the claim, it cannot be known whether there is a case or controversy of which the federal courts could have cognizance. Thus, in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, the National Labor Relations Board might have decided that no interstate commerce was involved and that it was therefore without jurisdiction. In such event there would be no controversy between the parties, nor could there be a contro-

versy until that Board made a contrary decision and also decided against the petitioner on the merits. That is exactly the situation we have here. Until the Board makes a final decision, we cannot know whether it and the Railroad disagree about any questions of fact or law or whether if there is disagreement it can cause the Railroad any harm. See also *Allen* v. *Grand Central Aircraft Co.*, decided by this Court May 24, 1954. This also was one of the numerous grounds on which Judge Swaim dissented from the decision below, pointing out that if the Board's final decision were in favor of the Railroad it would suffer no possible damage from the alleged procedural error. R. 123.

The decision below was contrary to all these principles.

3. The Decision Below Transfers to the Courts the Resolution of Questions Vested in the Adjustment Board for Initial Decision.

The Court below held that the Board, with the Referee sitting as a member, should be enjoined from proceeding further with the case because notice had not been given to certain allegedly involved parties, holding that the Referee had no authority to participate in deciding such a question. R. 115-6. Such holding has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the carrier makes the contention that notice to others than the claimant and the carrier is required.

Prior to the decision below, when the Labor Members and the Carrier Members of the Board deadlocked on a carrier contention that notice was required to others than the claimants and the carriers, a referee was appointed pursuant to § 3, First (1) of the Railway Labor Act to sit with the Board as a member and decide whether such notice was required. But since the decision below, the National Mediation Board has no longer made appointments of referees in such cases, the administration of such claims is paralyzed, and the claims are simply piling up, because

there is no way that the deadlock can be resolved. Thus, in such cases, the decision below has stricken § 3, First (1) from the Act.

But even if referees should again be appointed in such cases, the decision below transfers from the Board to the federal courts the determination of any contention that third parties are involved, and if they are, their identity. If a referee is appointed, the decision below holds that the carrier may seek an injunction against the Board, with the referee sitting as a member, proceeding with its consideration of the claim. If the court finds that third parties are involved, the injunction would issue. If the court finds that third parties are not involved, presumably the injunction would not issue, and consideration by the Board could continue. But in either event it would be the court, and not the Board, that would make the decision whether third parties are involved. This, under a statute with respect to which this Court has repeatedly and emphatically stated that the courts have a minimum function, and except where expressly conferred, no function, with the administrative processes having priority of operation even where not expressly provided. *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297; *General Committee* v. *MKT R. Co.*, 320 U.S. 323; *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239.

4. Even if the Board Should Issue an Invalid Award the Statutory Remedy of a Defense to an Enforcement Suit Would be Adequate.

It should be observed that the awards of the Board are not self-enforcing. The mere existence of an award (or, as in this case, the existence of the possibility of an award) in favor of the claimant deprives the carrier of nothing. The Board issues awards, but it does nothing about obtaining compliance with them. If the carrier does not comply with an award in favor of the claimant, then the claimant has two years within which to bring

the statutory proceeding for enforcement. Railway Labor Act, §§ 3 (p), (q). If the carrier does not comply, and an enforcement suit is not instituted within two years, the carrier has lost nothing. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-9. If a suit is brought by the claimant, then the carrier may raise in defense every argument that the Railroad is making here as well as any others it may think of later. In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 775-7, this Court held such very circumstance to preclude judicial intervention pending conclusion of the administrative proceedings. In a number of cases enforcement of an award has been denied for a variety of defects. In appropriate cases enforcement has been denied for lack of notice to involved parties and their lack of actual knowledge. *Estes* v. *Union Terminal Co.*, 89 F. (2) 768 (C.A. 8, 1937); *Kirby* v. *Pennsylvania R. Co.*, 188 F. (2d) 793 (C.A. 3, 1951).

In *Washington Terminal Co* v. *Boswell*, 124 F. (2d) 235 (C.A., D.C., 1941), Judge (later Justice) Rutledge, after a detailed review of the legislation, squarely held that the remedy of a defense to an enforcement suit is adequate. To the same effect is *N. O. Public Belt R. Comm.* v. *Ward*, 182 F. (2d) 654 (C.A. 5, 1950).

5. The Judicial Remedy Specified by the Railway Labor Act for Challenging the Validity of an Award is Exclusive.

The Court below failed to follow the established rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 404; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 301; *Wilder Mfg. Co.* v. *Corn Products Refg. Co.*, 236 U.S. 165, 174-5; *United States* v. *Babcock*, 250 U.S. 328, 331; *Yakus* v. *United States*, 321 U.S. 414. Similarly, where it specifies a particular judicial remedy for the review of administrative action, the specification of such remedy precludes any other. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *Order*

of R. Tel. v. N. O. T. & M. Ry. Co., 61 F. Supp. 869, 879-80; *Arnson v. Murphy*, 109 U.S. 238; *Yakus v. United States*, 321 U.S. 414.

Although such is the general rule, numerous decisions in this Court and in the lower courts show that it is applied with perhaps singular rigidity in the field of controversies in railroad labor relations. The Court below has not complied with the repeated and emphatic holdings of this Court that in the field of labor controversies in the railroad industry the courts are without jurisdiction of such controversies except those specifically vested in the courts by the Railway Labor Act, and that except for the administrative and judicial procedures specifically provided by the Act for the adjustment of controversies, there were to be no remedies. *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 302; *General Committee* v. *MKT R. Co.*, 320 U.S. 323. In the latter case, this Court stated that as a result there may be many areas in this field where neither the administrative nor the judicial function could be utilized, but that this was only to be expected in view of the congressional purpose in enacting the legislation. In that case this Court granted certiorari because of the importance of the problems raised by the courts' interfering in controversies governed by the Railway Labor Act. 320 U.S. 323, 327. Although it agreed that the court below properly decided that the petitioner was not entitled to relief, it reversed because the court below had entertained the case, and remanded with instructions to dismiss for lack of jurisdiction. See also *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338; *In Re Central R. of N. J.*, 145 F. (2d) 351, affd. 326 U.S. 561; *Radio Officers Union* v. *Nat. Med. Bd.*, 181 F. (2d) 801, 802; *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235, 244 (C.A., D.C., 1941); *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239.

The decision of the majority below is contrary to all these emphatic pronouncements by this Court.

6. No Notice Was Required to be Given to the Clerks.

It is unnecessary for the Court to reach this question, in view of the foregoing. But it has been a troublesome question in the administration of the Railway Labor Act, and the Courts of Appeals are divided. It would facilitate the functioning of the Railway Labor Act if the Court should pass on this issue.

This issue is one of the questions pending before the Board for decision. It deals with the merits of what would be the controversy if the Board decides it contrary to the Railroad's contention. It is one of the questions that have been argued before the Board.

In *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, 61 F. Supp. 869 (D.C., E.D. Mo., 1945), affd. 156 F. (2d) 1 (C.A. 8, 1946), cert. den. 329 U.S. 758, reh. den. 329 U.S. 829, the issue was brought into sharp focus. The Telegraphers had sought to intervene in a claim before the Board brought by the Clerks, and intervention was denied. The Telegraphers then sought to enjoin the application of an award in favor of the Clerks. It was held that not only did the Telegraphers have no right to intervene, but that it could not properly have been permitted to participate in the Board proceedings. To the contrary is the decision below by the Court of Appeals for the Seventh Circuit and expressions in other decisions by the same Court as well as by the Court of Appeals for the Third Circuit in *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793. This situation has given rise to a considerable quantity of litigation and to turmoil in the administration of the Railway Labor Act with respect to claims submitted to the Adjustment Board. It is important to the administration of that Act that this controversy be resolved.

7. If Notice to the Clerks Was Required, Such Requirement is Satisfied by the Clerks' Actual Knowledge of the Proceeding.

Prior to the decision below, it had uniformly been held in every case posing the question, including decisions by the Courts of Appeals for the Third, Seventh and Eighth Circuits, that where notice to third parties of a claim before the Adjustment Board was required, such requirement was satisfied without formal notice if the third parties had actual knowledge of the proceeding. *Estes* v. *Union*, 89 F. (2d) 768 (C.A. 8, 1937); *Hunter* v. *A. T. & S. F. Ry. Co.*, 188 F. (2d) 294 (C.A. 7, 1951), cert. den. 342 U.S. 819, reh. den. 342 U.S. 889; *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (C.A. 3, 1951). The court below refused to follow the above cases, including its own prior holding, on the ground that the principle was wrong in the light of additional facts presented. It thus appears that in this respect also the Court of Appeals for the Seventh Circuit is in disagreement with Courts of Appeals for other Circuits. The resolution of this issue in a particular case should not be left to the fortuity of geography.

CONCLUSION

The Court below has failed to follow established and clear principles of judicial review of the administrative process. Under its holding, the judicial function may be invoked at any stage of the administrative process when a participant is dissatisfied with the conduct of the agency. This has already resulted in the frustration of the functioning of the Railway Labor Act with respect to certain types of claims presented to the Adjustment Board. The decision below also transfers from the Board to the federal courts the function of deciding whether third parties are involved in claims presented to the Board. In addition, the decision below, with respect to its holding concerning the requirement of notice to third parties and the effect of actual knowledge in the absence of formal notice, is

in conflict with holdings in other circuits. A resolution of this conflict, and a reiteration of the applicability to proceedings before the Adjustment Board of the established principles governing judicial review of the administrative process, is necessary if the Railway Labor Act is to function as Congress intended.

Respectfully submitted,

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APPENDIX

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 926), 45 U.S.C., ch. 8; U.S.C.A., Title 45, secs. 151 et seq.

Section 2, Seventh:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Tenth:

> "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, * * *"

Section 3, First (i):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3, First (j):

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3, First (l):

> "Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. * * *."

Section 3, First (p):

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the pe-

titioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 3, First (q):

"All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioners*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF FOR THE PETITIONERS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioners*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court did not issue an opinion. Its findings, conclusions, and order are in the record. R. 35, 38, 40. The opinions of the Court of Appeals (R. 45, 57) are reported in 212 F. (2d) 22.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954. R. 60. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code as amended. The petition for a writ of certiorari was filed June 11, 1954, and was granted October 14, 1954. The record as printed for this Court after grant of the writ was received November 30, 1954. On December 23, 1954 the time within which to file this brief was extended ten days.

QUESTIONS PRESENTED

1. Whether, prior to a decision by the National Railroad Adjustment Board on a contention of the carrier that a claim should be denied because the Board had not given notice to allegedly involved parties, there is a "case or controversy" between the carrier and the Board or its members.

2. Whether a referee, sitting with and as a member of a Division of the National Railroad Adjustment Board to consider and decide a claim on which the regular members have previously deadlocked, has authority to consider and decide whether "involved" parties are absent from the proceeding.

3. Whether, while the National Railroad Adjustment Board is considering a claim of a labor organization that a carrier has violated a collective bargaining agreement, and the carrier contends that an award should not be made because of the absence of allegedly requisite parties, a District Court has jurisdiction to enjoin the Board from giving further consideration to the claim until it has given notice to such allegedly requisite parties.

4. Whether respondent has exhausted its administrative remedies for its contention that requisite parties are absent from a proceeding before the National Railroad Adjustment Board, prior to the final decision of the Board.

5. Whether the judicial remedy provided by the Railway Labor Act for challenging the validity of an award of the National Railroad Adjustment Board, by way of defense to an enforcement suit, is exclusive.

6. Whether, if the National Railroad Adjustment Board should issue an invalid award, the defense of invalidity of the award in the statutory suit to enforce the award would be an adequate remedy to the carrier.

7. Whether, under Section 3, First, (j) of the Railway Labor Act, providing that the National Railroad Adjustment Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes", in a dispute arising from a claim that a carrier has assigned work in violation of a collective bargaining agreement, notice is required to others than the claimants and the carrier.

8. Whether, in the event the answer to question 7 is in the affirmative, the Board is without jurisdiction to make a decision in the absence of such notice.

9. Whether, in the event the answer to question 7 is in the affirmative, actual knowledge of the proceeding by the others allegedly required to be given notice satisfies such requirement.

10. Whether the Court below misconstrued the decision of this Court in *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, as holding that where it was claimed that certain work was contracted for in more than one collective bargaining agreement, it was the function of the Adjustment Board to "resolve the conflict".

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C., Secs. 151 et seq.) are set forth in the appendix.

STATEMENT

This action was brought by the Illinois Central Railroad Company (hereinafter referred to as the "Railroad") against the National Railroad Adjustment Board, Third Division (hereinafter referred to as the "Board") and its individual members, including the referee, to enjoin the Board from making any disposition of a claim filed against the Railroad by The Order of Railroad Telegraphers (hereinafter referred to as the "Telegraphers"), until the Board should serve a notice of said claim on the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the "Clerks") and upon an individual represented by the Clerks, and to compel said defendants to serve notice of the claim upon the Clerks and said individual. R. 3, 26, 32, 35. Preliminary and permanent relief were requested. R. 32. The Telegraphers were permitted to intervene as a defendant. R. 11.

The District Court granted a preliminary injunction against the Board prohibiting it from deciding the claim. R. 40. An appeal was taken by the Telegraphers and the members of the Board selected by the labor organizations (hereinafter referred to as the "Labor Members"). R. 42. The appellants below are the petitioners here. The respondents are the Railroad and the members of the Board selected by the carriers (hereinafter referred to as the "Carrier Members").

Although the parties are numerous, the facts are simple.

On July 1, 1951, the Telegraphers filed a claim with the Board alleging that certain work at Palestine, Illinois, subject to the contract between the Telegraphers and the Railroad, had been assigned by the Railroad other than as provided in the contract. The claim was docketed as No. TE-5722. R. 28. The work in question had been assigned to a position subject to the contract between the Clerks and the Railroad. R. 28. The Clerks advised the Railroad that while it took no position on the question

whether the Telegraphers' contract covered the work, it did take the position that its contract covered the work, and if the work should be assigned other than as provided in the Clerks' agreement it would present a claim for violation of its agreement. R. 13, 30-1, 38. The Railroad thereupon argued to the Board that the claim was not really against it but was a dispute between the Telegraphers and the Clerks and should be dismissed unless the two labor organizations were brought into the case. R. 28-9, 36-7. The Board did not serve a formal notice upon the Clerks to appear and be heard on the Telegraphers' claim, but the record before the Board showed that the Clerks had actual knowledge of the pendency of the proceeding. R. 12, 28-9, 34, 37.

The ten regular members of the Board divided evenly on the question whether the claim should be dismissed because the Board had not given notice to the Clerks, and pursuant to Section 3(1) of the Railway Labor Act a referee was selected to sit as an additional member of the Board and dispose of the claim. R. 13. When Docket No. TE-5722 came on for hearing before the Board with the Referee sitting as a member, one of the Carrier Members objected to proceeding with the hearing on the ground that formal notice had not been given to the Clerks or to members of the craft represented by the Clerks. R. 28-9, 37. When such objection was made, one of the Labor Members, who is a vice-president of the Clerks, stated that the Clerks were not "involved" in the dispute. R. 13. Railway Labor Act, Sec. 3, First, (j) directs that notice be given to persons "involved". The consideration of the objection was in private without the participation of the Referee. R. 29, 37. Upon resumption of the open hearing, the Carrier Member who had made the objection announced that his objection had resulted in a tie vote and was therefore lost. R. 29, 37. The hearing was resumed and argument presented to the Board by both sides. R. 29, 37. While the Board, with the Referee as a member, had the

case under advisement, this action was brought to enjoin the Board from making a decision until after notice is given to the Clerks. R. 27-8, 32.

SUMMARY OF ARGUMENT

1. The Railroad has not exhausted its administrative remedies. Whether the statutory direction of "due notice of all hearings to the employee or employees and the carrier or carriers involved" required notice to the Clerks in TE-5722, and if so, whether the Board may determine the claim in the absence of such notice, are among the questions which the Board will decide if permitted to do so. In this aspect of the case, it is indistinguishable in principle from *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman SS. Corp.*, 327 U.S. 540; *Jonco Aircraft Corp.* v. *Franklin*, 346 U.S. 11. Here, as in *Yakus* v. *United States*, 321 U.S. 414, the complainant cannot assume that it will be unsuccessful in the administrative proceeding.

2. Since the Board's decision may be in the Railroad's favor, the action is premature and there is no case or controversy. If the Board decides for the Railroad on any of the grounds the Railroad has urged, it is not harmed. The contention that the expense of participating in the administrative proceeding is legally recognizable harm is without substance, both because the hearings have been held and there remains nothing but for the Board to reach its decision, and because it has repeatedly been held to the contrary. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-2; *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 777-9; *Allen* v. *Grand Central Aircraft Corp.*, 347 U.S. 535, 540. Since there is no harm to the Railroad, now or imminent, and harm can result only from a series of contingencies, there is no case or controversy. *Eccles* v. *Peoples Bank*, 333 U.S. 426; *Pub. Serv. Comm.* v. *Wycoff Co.*, 344 U.S. 237; *Ashwander* v. *Tenn. Valley Auth.*, 297

U.S. 288, 324-5; *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239, 240.

3. The remedy provided by the Railway Labor Act for challenging the validity of an Adjustment Board award is exclusive. Not only is it the general rule that the remedies provided by statute are exclusive, but it has repeatedly been held that such principle must be rigorously applied in matters subject to the Railway Labor Act, and but for the remedies provided by that Act in the railroad labor field, there were to be none. *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297; *General Committee* v. *MKT R. Co.*, 320 U.S. 323. The Act provides for the method of challenging the validity of Board action, in an enforcement suit. There may be no other.

4. The decision below transfers to the courts the initial decision of whether notice is required to third parties in any particular case, whenever the carrier desires to have the initial decision by the courts. Under that decision, the carrier may at any time seek to enjoin the Board from proceeding in the absence of additional notices, and the injunction would be granted or denied, as the court thinks additional parties are or are not involved. The decision below is predicated in part on the holding that the referee cannot base his decision on any question of notice. Such holding is admittedly without precedent, has frustrated the operation of the Act in such cases, and is contrary to the practice theretofore under the Act.

5. The remedy provided by the Act for challenging the validity of an award is adequate. If adverse to the Railroad, an award causes no harm unless the statutory enforcement suit is instituted. In such suit, any defense may be asserted, and if sound, no harm is caused the Railroad. There is thus no ground for equitable jurisdiction at this stage.

6. No notice to the Clerks was required. The jurisdiction of the Board is to decide disputes submitted to it. No

dispute between the Railroad and the Clerks has been submitted. The Clerks do not consider themselves involved in the dispute submitted by the Telegraphers. Notice to the Clerks would serve no purpose, for the Board could not decide a question not submitted, whether the Clerks' contract covers the work. There is no dispute between the Clerks and Telegraphers; and if there were, such dispute would be beyond the jurisdiction of the Board.

7. No notice was required to the clerk performing the work in question. Until this case, it had never been suggested, administratively or in court, that any such notice was required. In the absence of detailed seniority rosters, the Board would not know to what individual to give notice. And since the Clerks are shown to be aware of the situation and to have taken a position, it may be presumed they are authorized to take appropriate action on behalf of the individual clerk. *E. J. & E. R. Co.* v. *Burley*, 327 U.S. 661. No question of notice to the individual clerk was raised before the Board, and may not be raised by the Railroad now. *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

8. The Clerks had actual knowledge of the Board proceeding, and deliberately refrained from any effort to participate. Such circumstance remedies any defect of lack of formal notice. Insofar as the Clerks would be bound by any decision had they received formal notice, they would be similarly bound under the circumstances. *E. J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7. Any past policy of the Board that would not permit the Clerks to participate in the absence of formal notice is irrelevent in the absence of its application in this case, especially since it is known the Clerks had no desire to participate. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Yakus* v. *United States*, 321 U.S. 414, 434, 436.

9. The jurisdiction of the Adjustment Board is limited to the adjustment of grievances and the interpretation and

application of existing contracts in the case of a dispute between an employee or group of employees and a carrier or carriers. It is without any power to change any provision of any contract. If it appears that two or more contracts overlap or may overlap in specifying the work subject to their terms, the remedy lies elsewhere. The Court below erred in finding that *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, holds that in such situation the Adjustment Board has the function "to resolve the conflict."

ARGUMENT

I. The District Court Was Without Jurisdiction to Grant an Injunction Because the Railroad Had Not Exhausted Its Administrative Remedies

In this case the Railroad seeks to have the Board enjoined from proceeding further to consider the claim filed by the Telegraphers because the Board had not given notice to the Clerks. Section 3, First, (j) of the Railway Labor Act directs that the Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." The Board did not give notice of the proceedings in question to the Clerks. The Railroad thereupon argued to the Board that it should not make an award in favor of the Telegraphers because the Clerks were "involved" and the Board could not properly make an award to the Telegraphers without having followed the direction to give notice to all parties "involved".

Whether the Clerks are "involved" in the dispute submitted by the Telegraphers, whether notice to the Clerks is therefore required, and whether the Board may properly proceed to determine the Telegraphers claim in the absence of such notice, are of course among the issues that the Board, with the referee sitting as a member, must decide and will decide if not enjoined from doing so. In such situation the District Court was without jurisdiction to

grant an injunction because the Railroad had not exhausted its administrative remedies. This is crystal-clear both on precedent and in reason.

In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Jonco Aircraft Corp.* v. *Franklin*, 346 U.S. 11; and in many other cases, this Court has uniformly held that the continuation of administrative proceedings may not be enjoined on the ground that the administrative tribunal was without jurisdiction. In each of those cases this Court held that there could be no judicial determination of the agency's jurisdiction until the administrative proceeding was completed; if the administrative hearing or its result should be invalid, it could then be judicially declared invalid in an appropriate proceeding.

In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, while renegotiation proceedings were pending, the plaintiff sought a declaration that the proceedings could not properly be held because the Renegotiation Act was unconstitutional. This Court held that before there could be judicial intervention the administrative process must be completed, saying (at p. 767):

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, the plaintiff sought to enjoin the National Labor Relations Board from holding a hearing concerning an alleged unfair labor practice, claiming that the Board was without jurisdiction because no interstate commerce was involved and the mere holding of the hearing would cause irreparable injury. This Court held that there could be no judicial determination of the Board's jurisdiction until the

administrative proceeding was completed; if the administrative hearing or its result were invalid, it could then be judicially declared invalid. The Court said (at pp. 50-1):

> "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In that case it was only a preliminary injunction that had been granted and from which an appeal had been taken, as in this case. This Court recognized that the granting of a preliminary injunction is a matter of discretion which would not ordinarily be reversed on appellate review except for a clear abuse of discretion, but it held that it was clearly an improvident exercise of discretion to grant a preliminary injunction where it appeared that the District Court was without jurisdiction because the administrative proceedings had not been completed. At p. 52.

Macauley v. *Waterman S.S. Corp.*, 327 U.S. 540, was a suit for an injunction against holding further administrative renegotiation proceedings and a declaration that the Price Adjustment Board was without jurisdiction because the contracts involved were with a foreign government and not with the United States. In accordance with well-established doctrine this Court held that the District Court was without jurisdiction to entertain the action because the administrative proceedings had not been completed.

Yakus v. *United States*, 321 U.S. 414, went farther. It involved a criminal prosecution for a violation of the price-control statutes, in which it was held that the defendants could not attack, in that proceeding, the validity of certain regulations since he had not availed himself of the administrative remedy for attacking them. It appeared that the petitioners had very good grounds for attacking the regulations in an appropriate administrative proceeding. Said this Court (at p. 437):

> "We cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled."

Similarly here, we cannot assume that the Board will make an erroneous decision. In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision.

Interesting applications adopted by other courts, with clear expositions of the principle, are found in *Osmond* v. *Riverdale Manor*, 199 F. (2d) 75 (4th Cir. 1952); *Forrest Harman & C* v. *Rottgering*, 106 F. Supp. 993; *Thomas* v. *Ramberg*, 239 Minn. , 60 N.W. (2d) 18 (1953); and the very recent decision of the Court of Appeals for the District of Columbia Circuit, *Am. Air Export and Import Co.* v. *O'Neill, et al.*, No. 12159, decided December 23, 1954.

In the Courts below the Railroad inexplicably relied on *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, for the proposition that equitable relief was warranted while the administrative proceeding was pending. In that case a petition had been filed for instructions to a trustee in bankruptcy to assign certain work to one craft rather than another, and for an injunction not to displace the men doing the work. This Court said (at p. 567):

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on that issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then."

Here we have the same agency, and here too it has been specifically designated to decide who is "involved" in a dispute submitted to it. Certainly it must be given the first opportunity to make a final decision, and "certainly the extraordinary relief of an injunction should be withheld, at least, until then."

The failure by the Railroad to exhaust its administrative

remedy was one of the reasons for which Judge Swaim[1] dissented from the decision below. After quoting from *Aircraft and Diesel Corp.* v. *Hirsch*, *supra*, and discussing the purposes of the Railway Labor Act, he cogently concluded (R. 57):

> "if either party to a claim before the Board were privileged to go into court and enjoin further proceedings by the Board each time the Board decided some preliminary matter or took, or failed to take, some procedural step to which the complaining party objected, there would be neither 'prompt' nor 'orderly' settlement of such disputes, and the above quoted fundamental purpose of the Railway Labor Act would be defeated."

II. The Action Was Premature Because the Board's Decision May be in Accord With the Railroad's Contentions. There Is Thus No Case or Controversy

We had supposed it axiomatic that before judicial relief could properly be sought a party must show that he has been or is being or is about to be hurt. In the instant case the Railroad may never be hurt by the allegedly improper procedure the Board is following. See *Order of R. Conductors* v. *Pitney*, 326 U.S. 561, 567; *Allen* v. *Grand Central Aircraft*, 347 U.S. 535, 539-40; *Myers* v. *Bethlehem Corp.*, 303 U.S. 41. As this Court said in *Order of R. Conductors* v. *Pitney*, *supra*, with respect to a different alleged violation of the Railway Labor Act:

> "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute." (At p. 567.)

[1] Prior to his appointment to the Court of Appeals, Judge Swaim had had very extensive experience in the administration of the Railway Labor Act, both as a referee in numerous Adjustment Board cases and as a member of several Presidential Emergency Boards established under Section 10 of the Act.

In the instant case the Board, if permitted to decide, may decide for the Railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the Railroad. See *Order of R. Telegraphers* v. *N.O.T. & M. Ry. Co.*, 156 F. (2d) 1 (8th Cir., 1946), cert. den. 329 U.S. 758. To be sure, the Board might make a decision that would turn out, on appropriate judicial review, to be wrong. But the mere possibility of an erroneous decision is hardly the basis for enjoining administrative action. So long as the Board is given authority to decide questions, it must have authority to decide them either way. *Pope* v. *United States*, 323 U.S. 1, 14; *Burnet* v. *Desmornes y Alvarez*, 226 U.S. 145, 147, 57 L. Ed. 159. The Board, with a referee sitting as a member, has denied a number of awards to claimants because notice had not been given to third parties which were found to be involved. See, e.g., Third Division Awards Nos. 1193, 1400, 5432, 5433, 5599, 5600, 5627, 5644, 5751, 5759, 6051, 6052, 6072. Indeed, the very Referee on the claim here involved, who was one of the defendants in the District Court and is enjoined by that Court from giving further consideration to the claim, has on occasion voted to remand a claim for further proceedings because it appeared to him that notice had not been given to "involved" third parties and a jurisdictional dispute was presented. See Third Division Award 6224.

The Railroad contends that the mere holding of the hearing causes it harm because it is subjected to the expense of participation in a proceeding which can properly be decided only by not sustaining the claim. There are at least two determinative answers to such contention. It has repeatedly been held that administrative proceedings may not be enjoined on the ground that their continuance will harm one of the participants. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51-2 (claim of damage to labor relations and expense); *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 777-9 (multiplicity of suits and

expense); *Allen* v. *Grand Cent. Aircraft Corp.*, 347 U.S. 535, 540 (damage to bank credit). But the contention here is without basis in fact, for the administrative hearings have all been held and all that remains is for the Board to reach and announce its decision.

The prematurity of this lawsuit is, of course, but another aspect of the principle that judicial relief may not be sought until the administrative remedy has been exhausted. Until the Board sustains or denies the claim, it cannot be known whether there is a case or controversy of which the federal courts could have cognizance. Constitution, Art. III, Sec. 2. This is an action against the Board and its members. Until the Board makes a final decision, we cannot know whether it and the Railroad disagree about any question of fact or law or whether if there is disagreement it can cause the Railroad any harm.

The Railroad can be harmed only if the Board decides all issues contrary to the Railroad's contentions and sustains the Telegraphers' claim, and the Telegraphers then bring judicial proceedings to enforce the resulting award and are successful. We show below that in such judicial proceedings the Railroad may raise in defense every contention against the validity of the award that it is raising here, and that it may properly make such contentions only in such a judicial proceeding. Such a proceeding would present a "case or controversy", but until then there is none.

The primary test of "case or controversy" is a showing of present or imminently threatened legal harm. Here harm can result to the Railroad only if each of a series of contingencies eventuates. In such situation, no justiciable case or controversy is presented. *Eccles* v. *Peoples Bank*, 333 U.S. 426; *Great A. & P. Tea Co.* v. *Grosjean*, 301 U.S. 412, 429, 430; *Pub. Serv. Comm.* v. *Wycoff Co.*, 344 U.S. 237; *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239, 240; *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 325; *Coffman* v. *Breeze Corp.*, 323 U.S. 316. At the present time

it is only on multiple contingencies that the Railroad can suffer harm. But "claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 324-5; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434.

III. The District Court Lacked Jurisdiction of the Subject Matter Because the Judicial Remedy Specified By the Railway Labor Act for a Carrier Challenging the Validity of An Award Is Exclusive

In this case the Railroad complains that the Board is following an improper procedure in considering a claim, and seeks judicial relief to require the Board to follow the allegedly proper procedure. If in fact the Board is not complying with the Railway Labor Act in the manner in which it is entertaining the claim, and if the defect (if there be one) is not remedied before an award is made, and if the ultimate award is in favor of the claimant, such award would be invalid. If then the Railroad fails to comply with the award, and the Telegraphers use the statutory method provided for obtaining compliance by bringing an action under section 3(p) of the Act, within two years, the Railroad will have full opportunity to challenge the validity of the award for having been arrived at through improper procedure or for any other reason. That is the judicial review of Board action afforded to carriers by the Railway Labor Act. We submit there may be no other.

It is of course the normal rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 404; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 301; *Wilder Mfg. Co.* v. *Corn Products Refg. Co.*, 236 U.S. 165, 174-5; *United States* v. *Babcock*, 250 U.S. 328, 331; *Yakus* v. *United States*, 321 U.S. 414. Similarly, where it specifies a particular judicial remedy for the review of administrative action, the specification of such remedy precludes any other. *Anniston Mfg. Co.* v. *Davis*,

301 U.S. 337; *Order of R. Tel.* v. *N. O. T. & M. Ry. Co.*, 61 F. Supp. 869, 879-80; *Arnson* v. *Murphy*, 109 U.S. 238; *Yakus* v. *United States*, 321 U.S. 414.

Although such is the general rule, numerous decisions in this Court and in the lower courts show that it is applied with perhaps singular rigidity in the field of controversies in railroad labor relations. This Court has repeatedly and emphatically stated that in the field of labor controversies under the Railway Labor Act the courts are without jurisdiction of such controversies except those specifically vested in the courts by the Railway Labor Act, and that except for the administrative and judicial procedures specifically provided by the Act for the adjustment of controversies, there were to be no remedies. As this Court said in *Switchmen's Union* v. *Nat. Mediation Bd.*, 320 U.S. 297, 302:

> "Congress intended to go no further in the use of the processes of adjudication and litigation than the express provisions of the Act indicate."

In *General Committee* v. *MKT R. Co.*, 320 U.S. 323, this Court granted certiorari because of the importance of the problems raised by the courts interfering in controversies governed by the Railway Labor Act, 320 U.S. 323, 327. After reviewing the history of railway labor legislation, this Court discussed the availability of judicial remedies in this field, and said:

> "But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. * * * In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was

dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

"That history has a special claim here. It must be kept in mind in analysing a bill of complaint which, like the present one, seeks to state a cause of action under the Railway Labor Act and asks that judicial power be exerted in enforcement of an obligation which it is claimed Congress has created." (At pp. 332-3.)

In view of such considerations, this Court concluded (at p. 337):

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread."

So strong was this doctrine that although this Court agreed that the Court below had properly decided that the petitioner was not entitled to relief, it reversed because the Court below had entertained the case, and remanded with instructions to dismiss for lack of jurisdiction. And see *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338. See also *In re Central R. of N. J.*, 145 F. (2d) 351 (3d Cir., 1944), affd. 326 U.S. 561; *Radio Officers Union* v. *Nat. Med.*

Bd., 181 F. (2d) 801, 802 (D.C. Cir., 1949), where the Court said that no matter how erroneous the action involved might be, "Congress chose not to confer any judicial remedies in a case such as this."

Such are the holdings even in cases where but for the relief sought by the plaintiffs in those cases, no judicial relief was available. Surely it cannot seriously be argued that Congress and this Court meant that no judicial remedies were to be available in this field except for those specifically provided for by the Railway Labor Act but that in cases for which the Act does provide a specific judicial procedure for testing the validity of administrative action other remedies should also be available.

In *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (D.C. Cir., 1941), affd. by an equally divided court, 319 U.S. 732, the Court of Appeals for the District of Columbia discussed fully many aspects of this subject. The opinion contains a detailed review of the provisions of the Railway Labor Act. In the light of those detailed and comprehensive provisions for the adjustment of controversies, and the explicit and implicit purposes of Congress in enacting the provisions pertaining to Adjustment Board awards, the Court concluded:

> "We think Congress intended the courts during that period [the two-year period within which suits for the enforcement of Board awards might be brought] to keep hands off these controversies except in the manner provided in the Act." (At p. 244)

The same ruling was made in *N. O. Public Belt R. Comm.* v. *Ward*, 182 F. (2d) 654 (5th Cir., 1950), citing the *Boswell* case and *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239.

In the *Boswell* case, as here, it appeared that two labor organizations each claimed that the carrier had contracted with it for the assignment of certain work, and the carrier thought it should have a judicial remedy not provided for in the Railway Labor Act to determine its liabilities. To that argument, the Court said:

> "But if it were shown that the carrier had bound itself by conflicting contracts allocating the work * * * it would not follow that the enforcement suit is inadequate *or was not intended to be exclusive* * * * We know of no constitutional protection against the consequences of making inconsistent contracts concerning the same subject matter *nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result* and perhaps succeed in sustaining them by independent litigation." (At p. 248. Italics supplied.)

The Court held that the declaratory judgment procedure was intended to provide a judicial remedy where none existed before; it was not intended to displace existing judicial remedies, particularly special remedies designed for special subjects of litigation. (At p. 248.)

In *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239, this Court again held that the procedures of the Railway Labor Act were exclusive with respect to the matters there dealt with:

> "This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." (To the same effect see *O.R.C.* v. *Southern R. Co.*, 339 U.S. 255, 94 L. Ed. 542.)

The Railroad here argues that the Act requires the Board to give notice to the Clerks in a situation presented to it such as in Docket No. TE-5722. If that is so, then the Board must first decide whether Docket No. TE-5722 is such a situation. Certainly it must be within the jurisdiction of the Board to decide whether Docket No. TE-5722 presents a situation in which the Clerks should be given notice. *Pope* v. *United States*, 323 U.S. 1, 14. The Board has not yet made a final decision on that subject. Until it does, no court can properly decide that question, because no court has jurisdiction to do so. And for at least two years after the Board decides that question, no

court may review the decision other than in an enforcement suit. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (D.C. Cir., 1941); *N.O. Public Belt R. Comm.* v. *Ward*, 182 F. (2d) 654 (5th Cir., 1950).

But, argues the Railroad, it appears that the Board may decide that question erroneously. There are numerous answers to such contention, some of which are dealt with elsewhere in this brief. It is sufficient to make but three observations here. First, the Board may not decide the question erroneously. Second, if it does make a wrong decision, and the decision hurts the plaintiff in this action, the Railway Labor Act provides the exclusive method of review, in an enforcement proceeding. And perhaps most significantly in this connection, jurisdiction of a tribunal to make a decision includes jurisdiction to make a wrong as well as a right decision. *Pope* v. *United States*, 323 U.S. 1, 14; *Burnet* v. *Desmornes y Alvarez*, 226 U.S. 145, 147, 57 L. Ed. 159; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Every argument made by the Railroad here, attacking the validity of the potential award if it should be in favor of the Telegraphers, would be available to it in the judicial proceeding provided for by the Act, if such a proceeding should materialize. Under the Act, and under the repeated and emphatic pronouncements of this Court, such arguments are available only in such proceeding.

IV. The Decision Below Transfers to the Courts the Resolution of Questions Vested in the Adjustment Board for Initial Decision

The Court below held that the Board, with the referee sitting as a member, should be enjoined from proceeding further with the case because notice had not been given to certain allegedly involved parties, holding that the referee had no authority to participate in deciding whether third parties were involved, and if so, their identity. R. 51-2. The Court conceded that it could find no precedent for such holding. R. 51. It based such holding simply on the

reasoning that the Act provides for the appointment of a referee only to sit with the Board and make an award, that such provision contemplates that all procedural requirements of notice have already been met, that the authority of the referee to sit as a member of the Board has no relation to the obligation of the Board to give notice to "involved" parties, and that the Board has no power to proceed to do anything until all notices have been given. R. 52.

Such holding has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the carrier makes the contention that notice to others than the claimant and the carrier is required.

Prior to the decision below in this case, when the Labor Members and the Carrier Members of the Board deadlocked on a carrier contention that notice was required to others than the claimants and the carriers, a referee was appointed pursuant to section 3, First, (1) of the Railway Labor Act to sit with the Board as a member and decide the case. This was done in scores, if not hundreds, of cases from the time the Board was created until the decision below in this case. Referees sitting with the Third Division passed on the question of notice in at least the following awards of that Division: 371, 844, 902, 903, 1193, 1309, 1400, 2253-8 (containing a detailed review of the question by Referee Swaim, now Judge Swaim), 2548, 2549, 2550, 2551, 2552, 2553, 2596, 2597, 2650, 2651, 3932, 3933, 3934, 3999, 5432, 5433, 5599, 5600, 5627, 5644, 5702,[2] 5751, 5759, 5781, 5785, 5790, 5865, 5867, 5993, 6051, 6052, 6072, 6115, 6203,[2] 6204, 6205, 6206, 6224, 6306, 6357. Such practical interpretation and application of the Act from the very beginnings of the Board, without anyone challenging its propriety until very recently, and with the National Mediation Board continuing to appoint referees

[2] Containing pertinent discussions by experienced referees.

in such situation until the decision below, should be conclusive.[3]

Perhaps even more conclusive is the fact that the prior practice worked; it was successful in getting the disputes resolved. But since the decision below in this case, the National Mediation Board no longer makes appointments of referees in such cases. (This is not shown in the record because it happened after the decision below, but respondents will not deny the fact.) Thus the administration of such claims is paralyzed, and the claims are simply piling up, because there is no way that the deadlock can be administratively solved under the decision below. In such cases, in effect, the administrative procedures of Section 3, First, (1) have been stricken from the Act by the decision below, and there has been substituted resort to the courts.

Even if the National Mediation Board should again appoint referees in such cases, the situation would not be improved, and under the decision below would probably be worsened and lead to a flood of additional litigation. Even with referees on the Board, the decision below effectively transfers from the Board to the Courts the initial determination of any contention that third parties are "involved", and if they are, their identity. If a referee is appointed, the decision below holds that the carrier may seek and obtain an injunction against the Board, with the referee sitting as a member, proceeding with its consideration of the claim. If the court finds that third parties are "involved", the injunction would issue. If the court finds that third parties are not involved, presumably the injunction would not issue and consideration by the Board

[3] United States v. Burlington & M. R.R. Co., 98 U.S. 334, 341; Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294; Brown v. United States, 113 U.S. 568; Wisconsin v. Illinois, 278 U.S. 367, 413; Lucas v. American Code Co., 280 U.S. 445, 449; United States v. Am. Trucking Assns., 310 U.S. 534, 549; cf. Order of Ry. Conductors v. Swan, 329 U.S. 520, 529; M'Keen v. Delaney's Lessee, 5 Cranch 22, 32; Edwards' Lessee v. Darby, 12 Wheat. 206, 210.

could proceed. But in either event it would be the court, and not the Board, that would make the initial decision whether third parties are "involved."

All this is the present and potential situation in the administration of a statute with respect to which this Court has repeatedly and emphatically stated that the courts have a minimum function, and except where expressly conferred, no function, with the administrative processes having priority of operation even where not expressly provided. *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297; *General Committee* v. *MKT R. Co.*, 320 U.S. 323. If the administrative process in this type of case is to function as intended, and as it functioned prior to the decision below, with the courts not deciding issues presented to the Board at least until after the Board had decided them, a reaffirmation of the principles of the foregoing cases is necessary.

V. There Is No Case for Injunctive Relief Because Even If the Board Should Issue An Invalid Award the Statutory Remedy of a Defense to An Enforcement Suit Would be Adequate

It is a truism of course that the extraordinary equitable remedy of an injunction should not be granted unless there is no legal remedy or the legal remedy is clearly inadequate. It is clear, and it has been held, that the statutory remedy for an award improperly arrived at or otherwise defective, by way of defense to an enforcement suit, is adequate.

It should be observed first that the awards of the Board are not self-enforcing. The mere existence of an award (or, in this case, the existence of the possibility of an award) in favor of the claimant deprives the carrier of nothing. The Board issues awards, but it does nothing about obtaining compliance with them. If the carrier does not comply with an award in favor of a claimant, then the

claimant has two years within which to bring the statutory proceeding for enforcement of the award. Railway Labor Act, Sec. 3(p), (q). If the carrier does not comply, and an enforcement suit is not instituted within two years, the carrier has lost nothing. Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 48-9. If suit is brought by the claimant, then the carrier may raise in defense of the suit every argument that the Railroad is making here as well as any others that it might think of later. In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 775-7, this Court held as a ground for denying judicial intervention, pending the conclusion of administrative renegotiation proceedings, the circumstance that after the administrative proceedings were concluded the subcontractor could raise every question he was there urging in a suit against his prime contractor. In a number of cases enforcement of an Adjustment Board award has been denied for a variety of defects. *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. (2d) 39 (4th Cir., 1941); *System Federation* v. *L. & A. Ry. Co.*, 119 F. (2d) 509 (5th Cir., 1941); *Railroad Yardmasters of America* v. *Indiana H. Belt R. Co.*, 166 F. (2d) 326 (7th Cir., 1948); *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. (2d) 121 (3d Cir., 1943); *Southern Pac. Co.* v. *Joint Council*, 165 F. (2d) 26 (9th Cir., 1948); *Brotherhood of Railroad Signalmen* v. *A. T. & S. F. Ry. Co.*, No. 52-C-320; Northern District of Illinois, Eastern Division. And, in an appropriate case, enforcement may be denied because of lack of notice to involved parties and their lack of actual knowledge. *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (5th Cir., 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951).

But, says the Railroad, a court of equity should intervene in this situation with an injunction, because it could decide the issues in one case while the decision of them by the statutory procedures would require a multiplicity of suits. First, it should be observed that the "multiplicity" the Railroad fears is two. Second, the "multiplicity" of

two suits would occur only if the Board decides this case in favor of the Telegraphers both on the procedural points and on the merits, and renders an award in favor of the Telegraphers; then the Railroad fails to comply with award; then the Telegraphers bring an enforcement suit; then the Telegraphers prevail in that suit; then the Railroad assigns the work in question in accordance with the Telegraphers' agreement; then the Clerks bring proceedings before the Adjustment Board; then the Board renders an award in favor of the Clerks; then the Railroad fails to comply with the award; and then the Clerks bring judicial enforcement proceedings. Each and every one of those contingencies, many of them quite speculative, must occur before there could be a "multiplicity" of as many as two suits. In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 778-81, this Court held that a potential multiplicity of sixteen or more suits was no excuse for not following the administrative procedure through to conclusion.

Furthermore, the intervention of equity in this situation would almost certainly not avoid the "multiplicity" even if all the foregoing contingencies occurred. If all of them occurred there would be two suits, but in order for one case to settle the issues that otherwise might require two cases, the following would have to occur: this case would have to be decided in favor of the Railroad; the Clerks would then have to come before the Board and argue on a question in which they have no interest, whether the Telegraphers' contract covers the work, and would argue also that their contract covers the work; the Board would have to decide a question not before it, whether the Clerks' contract covers the work; the determination by the Board of an issue not before it would have to be binding on the Clerks. The absence of any one of those conditions would prevent the avoidance of multiplicity. And even if all those conditions were present, and the Railroad failed to comply with the award and an enforcement suit were

brought, we would be right back to two suits. And if the Board did not make a final determination of the question not before it, whether the Clerks' contract covers the work, there would of course be no avoidance of the possibility of two suits.

The very making of the argument of multiplicity emphasizes the analysis *infra*, under Point VI, of the futility of the professed purpose of this litigation, to require that notice be given to the Clerks. If the Clerks do not appear after notice or if the Board does not decide a question not before it, the possibility of "multiplicity" is not avoided. It might be avoided only if the Board has power to decide and does decide, in a proceeding brought by the Telegraphers claiming a breach of its contract, that either the Telegraphers' contract or the Clerks' contract covers the work and the other does not, or that if both cover the work one of them is thereby, or perhaps retroactively, changed. In the absence of such a determination, all this litigation by the carriers is inevitably futile. The Railroad points to nothing, nor can it, to show the Board has jurisdiction to make any such determination. See the very cogent statement in the concurring opinion in *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (5th Cir., 1937), at pp. 773-4, and in the dissenting opinion below. R. 59.

VI. No Notice Was Required to be Given to the Clerks

This issue is the basic issue between some of the carriers and the labor organizations under the Railway Labor Act concerning the jurisdiction of the Adjustment Board, and underlies all the other issues in this case. It is one of the questions pending before the Board for decision in this case but which the Court below has predetermined for the Board. It deals with the justiciable controversy that would exist if the Board decides this issue contrary to the Railroad's contentions and also decides the merits of the Telegraphers' claim of contract violation against the Rail-

road. It is one of the questions that have been argued before the Board. The Railroad's case must be predicated on the proposition that if the Board decides this issue contrary to the Railroad's contentions it will be irreparably injured. We will show that if the Board decides it contrary to the Railroad's contentions it will be deciding it correctly.

This issue is one of first impression in this Court, although it has been a subject of litigation in the lower courts for many years. The Seventh and Eighth Circuits have reached opposite conclusions, and the Third Circuit has indicated views in accord with the Seventh Circuit. We believe the decisions expounded by the Court of Appeals for the Eighth Circuit present the sound answer.

This question was fully considered and resolved in *Order of Railroad Telegraphers* v. *N. O. T. and M. R. C.*, 61 F. Supp. 869 (D.C., E.D. Mo., 1945), affd. 156 F. (2d) 1 (8th Cir., 1946). This Court denied a petition for certiorari, 329 U.S. 758, and denied a rehearing on the petition for certiorari, 329 U.S. 829. The facts involved in that case brought this issue into sharp focus. It appeared that prior to bringing the action the Telegraphers had sought to intervene in a Board proceeding brought by the Clerks; the basis for seeking intervention was that the Clerks' claim before the Board covered work that was subject to the Telegraphers' contract and was being performed under that contract. The Board denied intervention holding that its authority was to adjudicate the controversy between the claimant before it on the one hand and the carrier on the other, and that it had no authority to adjudicate disputes between two groups of employees. It then decided that the assignment of the work to employees not covered by the Clerks' agreement was a violation of that agreement. The Telegraphers sought in the District Court to have the award so obtained declared invalid and its application enjoined.

In comprehensive opinions both in the District Court and in the Court of Appeals it was held that not only did

the Telegraphers not have a right to appear in the Adjustment Board proceedings brought by the Clerks but that it could not properly be a party to those proceedings. The basis of the holding was that the resolution of the question whether the Telegraphers had a contract covering the work in question depended upon its contract and not on the provisions of the Clerks' contract, and it had no standing to argue whether the carrier had contracted also with another organization concerning the same work. The Court of Appeals held that insofar as a jurisdictional dispute between unions might be involved in the Adjustment Board proceedings the Board was without jurisdiction to decide it; that the Railway Labor Act left the resolution of such controversies to the National Mediation Board and Emergency Boards; and that the Adjustment Board could properly pass only on the interpretation or application of contracts between employees and carriers.

The language of Judge Hulen in the District Court in the same case indicates what we believe is the real purpose of the Railroad in this litigation, and of other carriers in pending related cases. 61 F. Supp. 869. In holding that the Telegraphers had no right to intervene in the proceedings on the Clerks' claim, he pointed out that "no controversy between the carriers and plaintiff Telegraphers' Union was presented to the Adjustment Board." At page 877.

> "The real question which the plaintiffs would have tried, had they been permitted to intervene before the Adjustment Board * * * was the limits within which collective bargaining agreements of the organizations with the carriers were effective—were the work and positions affected by the alleged overlapping of the two agreements properly within the Telegraphers' craft or the craft represented by the Clerks' Union?" At p. 877.

The answer to the question of asking the Board to pass on such matters was clear:

> "We find no basis in the sections of the Act setting up the Adjustment Board for concluding that Congress gave to the Adjustment Board jurisdiction or power to determine disputes between rival labor organizations." At p. 878.

The opinion shows that had the Adjustment Board permitted intervention and determined that the work in question was properly embraced within the contract of one craft and improperly included in the other, such decision would have been clearly beyond the Board's jurisdiction, and a nullity. The opinion concluded:

> "We are unable to find any authority, and we have not been cited to any, in support of the proposition that the National Railroad Adjustment Board has power to pass upon and determine jurisdictional controversies between rival unions and abrogate, in whole or in part, collective bargaining agreements between unions and carriers." At p. 879.

That, we believe, is precisely what the carriers are seeking, to have the federal courts require the Board to pass upon questions of craft jurisdiction and abrogate, in whole or in part, contracts between carriers and labor organizations when the improvidence of a carrier might have otherwise subjected it to liability for breach of contract.[4] They are thus seeking what they have never asked Congress to enact, and what we believe they would oppose enactment of concerning other questions, namely compulsory arbitration. And it would not be any ordinary compulsory arbitration, as of a question whether a particular provision should or should not be included in a contract. What would be arbitrated would be the question which of two contracts which a carrier has negotiated and signed with two craft organizations, contracting to assign certain work to each of the crafts, the carrier may

[4] This was recognized by Judge Swaim in his dissenting opinion below and, we submit, was irrefutably answered by him. R. 57-60, esp. at p. 59.

repudiate with impunity. In other words, what the Railroad must really be seeking in this litigation is a determination that when it appears that a carrier may have contracted with two crafts that certain work shall be assigned to each of them, the craft representatives should be subjected involuntarily to the Adjustment Board deciding which of the two contracts should be kept in effect and which should be modified or declared of no effect with the carrier free to ignore it. Section 6 of the Act provides the exclusive method of changing contracts. Section 2, Seventh, prohibits changing rules embodied in contracts in any manner other than as provided in Section 6. Section 2, Tenth, makes it criminal to violate Section 2, Seventh.

That such is the thrust of this litigation is made more apparent from an analysis of the possible, perhaps probable, consequences if the Board had given notice to the Clerks. The plaintiffs may say that its purpose is simply what it asks for, a requirement that the Clerks be notified of the Telegraphers claim. Suppose a formal notice had been issued by the Board, and the Clerks had ignored it or otherwise had not participated in the proceeding. It appears that the Clerks are of the view that they are not involved in the Telegraphers' claim. R. 13. Presumably, the worst consequence to the Clerks that would result from not participating would be that the issue determined would be *res judicata* as to it. But what issue is it that would be determined and would be *res judicata?* It would be simply the determination that the Telegraphers contract covers the work. But the Clerks do not dispute that the Telegraphers contract covers the work; they take no position on that issue. Surely the plaintiffs are not seeking so hollow an accomplishment as the Clerks' being bound to a proposition they have never disputed.

Little purpose would be served by citing other holdings and by distinguishing each of the cases on which the respondents rely by showing that in those situations the other party allegedly "involved" had no contract for the

work or that it was the right of the other party that was the issue in the claim presented to the Board. An Adjustment Board proceeding and a statutory judicial enforcement suit are not available in such a situation. In such situation the other party may have an interest in arguing to the Board that the claimant's contract does not cover the work, for in such situation his continuing to perform the work depends on the claimant's contract not covering the work. But where the other party has its own contract, on which it relies for its rights, and has no interest in the claimant's contract, it is meaningless to say that it is "involved" in the dispute.

This distinction is apparently observed by the Court of Appeals for the Eighth Circuit. The first case in that Court was the *N. O. T. & M. Case*, 156 F. (2d) 1. In that case the Telegraphers had sought to intervene in a proceeding before the Board brought by the Clerks claiming that certain work assigned to a telegrapher should have been assigned to a clerk. Intervention was denied, and the Clerks obtained an award. The Telegraphers brought suit to enjoin the application of the award. The Court held that in such situation the Telegraphers, claiming the work under their contract, had no right to be heard in the Clerks' proceeding and was properly denied intervention, because its rights depended on its contract and not on the Clerks' contract being inapplicable.

The next case was *Bro. of R. Trainmen* v. *Templeton*, 181 F. (2d) 527 (8th Cir., 1950). There the Trainmen had presented a claim to the Board claiming that work assigned to a baggageman should have been assigned to a brakeman under the Trainmen's contract. The baggageman's work was not covered by a contract, and the man doing the work had no contract rights to any employment. It was held notice was required in that situation.

It must be apparent from the foregoing that the Court consciously makes the distinction we urge. The contrary position is predicated on the Court flatly reversing itself

without doing it expressly and without even citing the case it was allegedly overruling.

The Railroad apparently takes the position that in claims such as are involved here the Board has authority to make not only a binding interpretation of the claimant-Telegraphers' contract which the claimant contends was violated, but also a binding interpretation of the Clerks' contract. If the Board has such authority, then the Clerks' contract would be interpreted in a proceeding not brought by the Clerks nor against them, at a time not of their choosing, and in a factual situation they may deem inappropriate.

That such was not the intention of Congress in enacting the Railway Labor Act is irrefutably evidenced by the structure of the Act. This dispute happens to involve allegedly overlapping contracts of the Telegraphers and Clerks, and the interpretation of the contracts of both those crafts is within the jurisdiction of the Third Division. But similar situations arise with respect to other crafts, such as signalmen and shopcrafts, or brakemen and train porters. For example, contracts pertaining to signalmen are interpreted by the Third Division, and contracts governing shopcrafts are interpreted by the Second Division. In such situation, indistinguishable in principle from the instant case, obviously we could not have both contracts authoritatively interpreted in the same proceeding.

Section 3(h) of the Railway Labor Act provides:

> "The said Adjustment Board shall be composed of four divisions, *whose proceedings shall be independent of one another*, and the said divisions . . . shall be as follows:
>
> * * * *
>
> Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers . . .
>
> Third division: To have jurisdiction over disputes involving . . . signalmen . . ." (Italics supplied.)

In a signalmen-shopcraft situation, would a division of the Board have jurisdiction specifically precluded to it by the Act? Would the signalmen in such a dispute have their contract authoritatively interpreted by the Second Division if a shopcraft presented a claim, a division in which the signalmen have no voice in the selection of members but the shopcrafts do? Would the shopcrafts have their contract authoritatively interpreted by the Third Division if the signalmen presented a claim, a division in which the shopcrafts have no voice in the selection of members but the signalmen do? Examples could be multiplied almost indefinitely. Obviously, any answer to any of the above questions but an emphatic negative is unthinkable, and would fly in the teeth of the Act. And it is impossible to make any distinction between such situations and the instant situation, so far as having any contract but the one allegedly being violated interpreted authoritatively in any proceeding. If the requirement of notice to others than the claimant and the carrier is limited, as we think it should be limited and heretofore has been limited in any final adjudication, to situations where the person doing the work is not governed by any contract on which he relies, none of the above insoluble problems can arise.

Of course, in considering the Telegraphers' claims, the Board was apprised of the existence of the Clerks' contract. If permitted to decide, it will take that fact into consideration, as well as the custom and practice in the industry. Cf. *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561. All this is pointed out in the dissent below by Judge Swaim, and is unanswered. R. 58.

It is clear that the underlying and pervading issue in this case is whether Congress intended to confer on the Board the authority and power to arbitrate, whether or not the unions desired arbitration, issues of which of two collective bargaining agreements should be modified or declared of no effect when the carrier contracted in both of them for the same work. In this aspect this case bears

close similarity to *General Committee* v. *MKT R. Co.*, 320 U.S. 323 and *General Committee* v. *Southern Pac. Co.*, 320 U.S. 338. To hold that Congress intended to confer such jurisdiction on the Adjustment Board in legislation to the enactment of which the railroad labor organizations gave their support, would probably be the most startling development in the history of railroad labor relations, and would create chaos. That Congress enacted no such provision is shown below in Point IX.

VII. No Notice Was Required to be Given to Any Individual Clerk

The argument and authorities cited above in Point VI are of course fully applicable to the Railroad's contention that the Board cannot proceed until it gives notice to the individual clerk. There are additional reasons why any contention that notice to individual clerks is required in this situation cannot be sustained.

Until the complaint was filed in this action, it had apparently never occurred to anyone that in a situation where the person performing the claimed work was himself covered by a collective bargaining agreement, notice was required to such person. This case is the very first in which any such contention was urged. The practical interpretation and application of the Act for a period of 19 years by everyone concerned, including the agency, the carriers, and the employees, should be conclusive.[5]

Furthermore, any such requirement is utterly impracticable. The claimant before the Board does not ask that anyone be removed from any position. In a claim such as the instant one it claims simply that certain work performed by others should be performed by employees under the Telegraphers agreement. In such situation the Adjustment Board has no way of knowing how much time such work requires. Thus the Board had no way of knowing whether the sustaining of the Telegraphers claims

[5] See cases cited in footnote 3.

would result in the abolition of a clerk's position. An administrative body must necessarily assume that there is no defect of interested parties until there is a challenge that there is such defect. The Board cannot know what other parties might conceivably be affected unless they are told. Furthermore, if the job of the person performing the work would be abolished in the event the claim submitted to the Board were to be sustained, in the normal situation the person performing the work would not be the one who would feel the greatest impact of such action; normally, he would exercise his seniority rights to displace someone else. It is the person at the bottom of the seniority roster who would thus feel the greatest impact, since he is the one who would most likely become unemployed. But the Board is not furnished with copies of seniority rosters.

In such situation, if notice is required to anyone, contrary to what we believe is the statutory requirement, it would seem to be fairly clear that such person should be someone on the seniority roster junior to the employee performing the work. If a clerk's position might be abolished as a result of sustaining the Telegraphers' claim, something the Board would not know, the Board would also not know the place of the incumbent on the seniority roster, nor the identity of the individual who might become unemployed as a result of sustaining the claim. Yet to this day no one, a carrier, the Board, or a referee has ever taken the position that notice should be given to others on the seniority roster.

The fallacy of holding that notice was required to the individual clerk was also pointed out by Judge Swaim in his dissent below. R. 58. Cf. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, and particularly the language in the opinion on rehearing, 327 U.S. 661, 663-6, and in the dissenting opinion at page 676.

Furthermore, lack of notice to the individual clerk was never raised before the Board. The Board was never asked to give notice to the individual clerk. And even in its

argument that the claim should not be granted because of lack of notice to all "involved", the only defect urged to the Board was that "each organization" should have been given the opportunity to present its case. R. 28. The Railroad should not be permitted to come into court and argue that the Board's decision, if adverse to the Railroad, will be wrong for a reason never advanced to the Board. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Yakus* v. *United States*, 321 U.S. 414; *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, where this Court said:

> "The contention does not seem to have been raised or pressed by respondents up to that point. The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (At p. 155)

See also *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 567.

It follows, *a fortiori*, from such principle that the Railroad should not be permitted to have the Board enjoined for failure to take action which no one, complainant or otherwise, ever asked it to take, for such principle should be applied most rigorously where the claimant seeks the extraordinary relief provided by a court of equity. *Natural Gas Co.* v. *Slattery*, 302 U.S. 300, 310; *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, 567; see also *General Utilities Co.* v. *Helvering*, 296 U.S. 200, 206; *Petersen Baking Co.* v. *Bryan*, 290 U.S. 570, 575.

Also, in accord with the views expressed in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, and the facts that the Clerks are aware of the Board proceeding, have considered the situation, have declared that they do not consider any rights under their contract involved in the Telegraphers'

claim, and have announced that they will make appropriate claim if any such rights are infringed, it may fairly be presumed that the Clerks are authorized to act for the individual unless there is a showing to the contrary. There is no allegation or other showing to the contrary. Cf. *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951).

The only argument the Railroad ever made to the Board concerning notice was that the claim be dismissed for lack of notice. The Board now has under advisement whether it shall do so, but is enjoined from making a decision. It should be permitted to decide the only issue concerning notice the Railroad has asked it to decide.

VIII. Even If Notice to the Clerks Was Required, Such Requirement Was Satisfied by the Clerks' Actual Knowledge of the Proceeding

It is conceded that the Clerks had actual knowledge of the proceedings on the Telegraphers' claim. R. 12, 28-9, 34. Prior to the decisions below in this case, it had been uniformly held in every case posing the question, including decisions by the Courts of Appeals for the Third, Fifth, and Seventh Circuits, that where notice to third parties of a claim before the Board was required, such requirement was satisfied without formal notice if the third parties had actual knowledge of the proceedings. *Estes* v. *Union Terminal*, 89 F. (2d) 768 (5th Cir., 1937); *Hunter* v. *A. T. & S. F. Ry. Co.*, 188 F. (2d) 294 (7th Cir., 1951), cert. den. 342 U.S. 819, reh. den. 342 U.S. 889; *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951). The reasoning of these holdings is that if a party in interest knows of the proceeding and stands by and permits the Adjustment Board to make its decision, without making any effort to apprise the Board of his views, he cannot later complain that the decision was erroneous or unauthorized. Cf. *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7.

The Railroad argues, and persuaded a majority of the Court below, that the previous holdings concerning the

effect of actual knowledge must be overruled because, they say, it has been the policy of the Board not to permit any parties other than those given formal notice to participate in Board proceedings. Perhaps they can make such a showing, although they give no indication of how long ago it was that any effort was made by anyone who had not received formal notice to appear in a proceeding. It is at least doubtful that any such effort has been made since the Telegraphers tried it and were rejected and the rejection sustained in *O. R. T.* v. *N. O. T. & M. R. Co.*, 156 F. (2d) 1 (8th Cir., 1946), cert. den. 329 U.S. 758, reh. den. 329 U.S. 829.

There are at least two basic errors in this argument of the respondents.

First, if we assume the policy alleged by the plaintiffs, and assume further that the Clerks want to appear in proceedings brought by the Telegraphers but would not be permitted to do so, and assume still further that the Board would be in error in refusing to permit the Clerks to appear, then the error would be in the refusal to permit the Clerks to appear. Such error would have absolutely no significance to the question of whether actual knowledge is a substitute for formal notice. The Board conceivably could refuse to permit the Clerks to appear after formal notice as well as after knowledge without notice. If the Board would not permit the Clerks to appear, that may be error according to the respondents' argument. But the remedy there would be to require the Board to rectify that error by permitting the Clerks to appear if they desire to do so, not by enjoining the Board from making a decision until it gives formal notice.

Second, any past policy of the Board is irrelevant. Before complaint may be made of error, the error must be shown in the particular case. Certainly the respondents cannot show that the Clerks tried to appear without notice and were not permitted to do so. In the absence of such a showing, the question of policy is irrelevant. In *United*

States v. *L. A. Tucker Lines*, 344 U.S. 33, it was urged that the Interstate Commerce Commission had a predetermined policy on a subject which would have required it to overrule an objection if the objection had been made. This Court held that the existence of such a policy did not constitute error in the particular case; it held that before the proceedings below could be challenged as invalid an attempt must have been made to have the Commission follow the proper procedure. To the same effect is *Yakus* v. *United States*, 321 U.S. 414, 434, 436. The improper procedure involved in this point, if any there be, would be the refusal of the Board to permit the Clerks to appear. We know from the record that the Clerks do not desire to appear. It is beyond reason to argue that the Board should be enjoined from making a decision because it has a policy that would erroneously prevent the Clerks from appearing if they wanted to do so, when the Clerks have made no effort to appear and we know they have no desire to appear.

Furthermore, it cannot be disputed that any considerations pertaining to the Clerks' contract that may pertain to the Telegraphers' claim has been fully presented to the Board and will be fully considered by it. This was pointed out by Judge Swaim in his dissent below. R. 58. In addition, one of the members of the Third Division is a vice-president of the Clerks, lending further assurance that if in determining the Telegraphers' claim any considerations should arise that may be of interest to the Clerks, they will not go unrecognized or unconsidered.

The reasoning of this Court in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7 is applicable here. If, as is the fact, the Clerks have full knowledge of the proceeding, consider themselves not "involved", and deliberately refrain from making any effort to participate, they will not be in a position to attack the validity of the award. In such circumstances, any proper interest of the Railroad in having considerations pertaining to the Clerks' contract

presented to the Board, other than by the Railroad, is satisfied. Once again the conclusion is inescapable that the true purpose of this litigation is to obtain judicial revision of the Railway Labor Act to subject the labor organization to compulsory arbitration of retroactive revision of possibly overlapping collective bargaining agreements. See the comments of Judge Swaim, R. 59-60.

IX. The Board Is Without Jurisdiction to Revise Contracts to Remove Overlaps in Their Scope

The Court below stated that it was the opinion of this Court in *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, that where it appeared that two collective bargaining representatives each claimed certain work was subject to the agreement between it and the carrier, it was "the function of the Adjustment Board to resolve the conflict." R. 56.

In the *Pitney* case, this Court did say that in interpreting and applying the scope of a collective bargaining agreement in the railroad industry, a particular agreement should be read in the light of others that the carrier may have made, as well as in the light of usage, practice and custom in the industry. At p. 567. Of course we have no quarrel with any such proposition. Presumably the Board will act in accord with such principle; certainly there is no allegation to the contrary.

Any such doctrine as that announced by the Court below would impose on collective bargaining in the railroad industry perhaps the most revolutionary procedure ever established in this country with respect to labor relations, in the railroad industry or elsewhere. Not only has it not been enacted by Congress or expounded by this Court, it would directly reverse the Congressional enactments and the decisions of this Court. It would impose on railroad labor compulsory arbitration, not simply of what changes should be made in the jurisdictional scope of collective agreements, but of what such changes should be retroactively decreed. See the discusson *supra*, under

Point VI. Let us look at the statutory provisions and the relevant decisions of this Court.

The jurisdiction of the Divisions of the Adjustment Board is set forth in subsections (h) and (i) of section 3, First, of the Railway Labor Act (45 U.S.C., Section 3, First, (h), (i)). Subsection (h) allocates the total jurisdiction among the four Divisions, and is not relevant here. Subsection (i) provides in relevant part:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner . . . ; but, failing to reach adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . ."

Plainly the jurisdiction of the Adjustment Board is limited to disputes between employees and carriers. It has no jurisdiction to revise agreements. (See the dissent of Judge Swaim below, R. 59-60.) The dispute in Third Division Docket No. TE-5722 was one between employees, represented by the Telegraphers, and a carrier, respondent Illinois Central Railroad Company. That dispute was over the interpretation and application of the agreement between those two parties, and the dispute was whether that agreement required certain work to be assigned under the rules of that agreement. There is no dispute between the Clerks and the Railroad over that question. Apparently the Railroad has assigned the work under the Clerks' agreement, and the Clerks apparently think such assignment was proper. Since the Clerks and the Railroad are in agreement on that question, there is no dispute between them to be referred to the Adjustment Board, and no such dispute has been referred to the Adjustment Board. The Board thus has no dispute before it in which it can make an authoritative determination that the Clerks' contract does or does not cover the work. And it is

only in the case of such a dispute that the Board can make such an award. To be sure, if the Telegraphers' claim is sustained, and if the work is then assigned under the rules of the Telegraphers' agreement, there may then arise a dispute between the Clerks and the Railroad. If those events all materialize, and if such dispute is unsuccessfully "handled in the usual manner" and is then referred to the Adjustment Board, it will then be within its province to make an authoritative interpretation of the Clerks' agreement. But not until then.

The Board may decide in Docket No. TE-5722 that there has been no violation of the Telegraphers' agreement. Or if a dispute arises over the meaning of the Clerks' agreement, it may decide that that contract does not apply to the assignment of the work in question. Or it may decide that both contracts contain provisions for the assignment of the work, or that neither of them does.

Nor is any dispute presented between the Clerks and the Telegraphers. The Clerks apparently take no position on whether the scope rule of the Telegraphers' agreement includes the work. R. 13, 30-1. But even if there were such a dispute, its resolution would be beyond the jurisdiction of the Adjustment Board because it would not be a dispute between "an employee or group of employees and a carrier or carriers." If there is any procedure for the resolution of such a dispute, it lies elsewhere. Or it may be subject only to negotiation, mediation, conciliation, and voluntary arbitration. See *General Committee* v. *MKT R. Co.*, 320 U.S. 323, 337; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338, 343-4; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 302.

Of course, the result may be that in appropriate proceedings awards may be issued one of which holds that the scope rule of the Telegraphers' agreement applies to the work and the other of which holds that the Clerks' agreement applies to the work. If one contracts in two different contracts to sell the same house to different people,

or to employ different people to perform the same work, he cannot by showing such fact, or showing that maybe such fact exists, bring both parties into court and have it decided which party ought to receive the house or the work and have it decreed that there should be no liability to the other. Certainly he could not require some real estate board or some labor board to make such decision and decree, simply because it operates in the general field, unless he could show some authority in the board to do so. If the Railroad has in fact contracted with both organizations for the same work, such circumstance gives it no right under any statute or the common law or any other law to have it adjudicated that it shall be relieved of one of its contracts. In any event, there is no jurisdiction in the Adjustment Board to make any such adjudication.

In the two *General Committee* cases and in the *Switchmen's Union* case, *supra*, this Court unequivocally held that except for administrative and judicial remedies specifically provided by the Railway Labor Act, there were to be no remedies in this field. See discussion *supra* under point III. The holding below reverses both the enactments of Congress and the pronouncements of this Court.

Although probably irrelevant, it may be pointed out that the Railroad is not without remedy. If in fact it has contracted with two organizations for the same work, or if it fears that it may have done so, the Railway Labor Act specifies the procedure for changing either or both of the agreements. Section 6; section 5, First; section 2, Seventh, Tenth; section 7; section 9; section 10. Those procedures provide for notice, negotiation, mediation by the National Mediation Board, and possibly arbitration or Emergency Board proceedings. Under Sections 2, Seventh and Tenth, and under the decisions of this Court cited above, there is no right to any other procedure.

CONCLUSION

Wherefore, the decision of the Court of Appeals should be reversed and the case remanded to the United States District Court for the Northern District of Illinois, Eastern Division, with instructions to dissolve the injunction and dismiss the Complaint.

Respectfully submitted,

MILTON KRAMER

January 3, 1955

STATUTORY PROVISIONS INVOLVED

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 926), 45 U.S.C. ch. 8; U.S.C.A., Title 45, secs. 151 et seq.

Section 2, Seventh:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Tenth:

> "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, * * *."

Section 3, (h):

> "The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.
>
> "Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the

helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

Section 3, (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3, (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3, (l):

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an ward. * * *."

Section 3, (p)

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit is such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the pe-

titioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 3, (q):

"All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 131

J. W. WHITEHOUSE, *et al.*,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

PETITION FOR MODIFICATION

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PETITION FOR MODIFICATION

The decision herein was that resort to the courts by the Railroad was premature. This Court therefore held that judicial relief was unwarranted at this time. The opinion specifically stated that the other issues in the case were not being decided. The Court expressly refrained from ac-

judicating the merits. It declined to resolve the "perplexing questions" presented, even though all the parties had asked the Court to do so.

But in the course of the opinion a few remarks were made which, it may be contended, relate to the merits. There are other cases even now before the courts and Board which might be affected by those remarks.

Because some of the language of the opinion might be misunderstood as a ruling beyond the actual decision, respondents respectfully ask for a modification of the opinion in these respects:

1. Excise the sentence "Analogy to the law of parties as developed for judicial proceedings is not compelling and in any event does not approach constitutional magnitude" from page 5, lines 3-6, of the slip opinion, to avoid the merits and conform to the well settled principle not to anticipate questions of constitutional law.

2. Excise "only necessary" from page 7, line 13 of the slip opinion.

3. Add the phrase, or its equivalent, "although the Court does not presently consider whether they would be bound by the ensuing award" after the word "proceeding" at page 6, line 24 of the slip opinion.

In view of the Court's statement that "Their difficulty [the questions on the merits] admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case," the opinion surely did not mean to prejudge the merits. However, unless this petition is granted,

the opinion may have that unintended effect on the lower courts and the Board.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, IN OPPOSITION.

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BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, IN OPPOSITION.

OPINION BELOW.

The district court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 80-86. The opinion of the court of appeals (R. 109-124) is reported in 212 F. 2d 22.

JURISDICTION.

The judgment of the court of appeals sought to be reviewed was entered on March 19, 1954 (R. 124). The petition for a writ of certiorari was filed on June 11, 1954. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code.

QUESTION PRESENTED.

When a union files a claim with the National Railroad Adjustment Board to a certain railroad position filled by a member of another union, whether Section 3 First (j) of the Railway Labor Act requires the Board to give due notice of hearings to the incumbent and his union.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act (45 U. S. C. 153 First (j)) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT.

In June 1951, petitioner Order of Railroad Telegraphers (herein referred to as Telegraphers) instituted a proceeding in the National Railroad Adjustment Board, Third Division, claiming a Palestine, Illinois, position on the line of respondent Illinois Central Railroad. That position is presently filled by D. A. Shears, a member of the Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employes (herein referred to as Clerks). (R. 45, 81.)

After the Telegraphers' claim was docketed by the Board, the Clerks wrote the respondent carrier that the position in question was covered by a contract between the Clerks and the Carrier, and that if the Telegraphers were successful in their claim before the Board, the Clerks would present to the Board a claim based on the same employment rights (R. 48, 82).

In August 1951, the respondent carrier filed its submission with the Board stating, *inter alia*, that the position was occupied by a member of the Clerks, that the work was of the type customarily performed by clerical forces, and that the claim was in substance between the Telegraphers and Clerks and should be dismissed unless the Board permitted each organization to present its side of the case (R. 45-46, 81).

The ten-member Board deadlocked on the merits of the case. Consequently, the National Mediation Board appointed a referee to resolve the deadlock, pursuant to Section 3 First (1) of the Railway Labor Act (R. 44, 80-81).

On May 13, 1953, when the case came on for hearing before the Board and the Referee, the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered for the first time (R. 46, 81-82).

The due notice point was the subject of a motion of a respondent Carrier Member, who objected to proceeding with the case until due notice was served on "the employees involved", whom he defined as "the Brotherhood of Railway Clerks or constituents thereof" (R. 24, 25-26, 46, 81-82). He pointed out that the Clerks had served notice upon the respondent carrier of their intention to prosecute a claim for the same work in-

volved in the proceeding before the Board in the event that the Telegraphers' claim were sustained by the Board (R. 24).

Pursuant to its custom when considering matters of procedure, the Board excluded the Referee from consideration of the due notice question (R. 26, 46, 82). At the executive session of the Board, the Carrier Member's motion that the Board not proceed with the claim "for want of jurisdiction" resulted in a tie vote and therefore failed to carry (R. 24-25, 46, 82).

The public session of the Board was then reconvened with the Referee present. In accord with the usual practice of the Board, the Referee was not requested to vote on the due notice question, nor did he request an opportunity to do so. (R. 24, 46, 82.)

After the public session reconvened, a respondent Carrier Member again objected to proceeding until due notice had been given pursuant to Section 3 First (j) of the Railway Labor Act. Nevertheless, the hearing was resumed. (R. 46, 82.)

On May 22, 1953, the respondent carrier filed a verified Complaint (R. 2) and thereafter moved for an order directing the defendants to serve due notice on D. A. Shears and the Clerks or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 5).

In the Complaint, the respondent carrier alleged that the Board has for several years denied the right of participation of any persons not formally served with notice, and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 47).

The Complaint pointed out that the Telegraphers were seeking to obtain a favorable Award on their claim, with no notice to the Clerks, and that the Clerks would then in turn seek a favorable Award, with no notice to the Teleg-

raphers.[1] Thus the respondent carrier would be required to employ two persons on one job. (R. 48.)

The five respondent Carrier Members of the Board filed an Answer admitting that under Section 3 First (j) of the Railway Labor Act due notice must be given to D. A. Shears and the Clerks. Their Answer showed that the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 21), and also showed that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954), on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 21-22, 28-30, 115).

In their Answer, which was supported by six exhibits (R. 24-43), the five respondent Carrier Members asserted that they are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 22).

The Carrier Members disclosed that only persons receiving formal notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 23).

The district court entered findings of fact and conclusions of law in favor of the respondent carrier (R. 80-84). Accordingly, a preliminary injunction was awarded which enjoined the Board from proceeding with this claim (1) until the Board gives formal notice to D. A. Shears and the Clerks, and (2) until the Board permits them to participate in the proceedings (R. 85-86).

[1] A chain of events of this very kind was described in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 303 (C. A. 7, 1951).

Petitioner Telegraphers and Labor Members appealed from the order of the district court (R. 89), but the Government did not appeal. The court of appeals affirmed the order of the district court, Judge Swaim dissenting (R. 109-124).[2]

[2] It may be noted that Judge Swaim concurred in the subsequent opinion in *Brotherhood of Railroad Trainmen* v. *Swan*, 26 Labor Cases, Par. 68,481 (C. A. 7, 1954), which required the district court to order the Board to give due notice to express-messengers and permit them to participate before the Board.

ARGUMENT.

1. Commencing in 1937, there have been at least five attempts to have this Court pass on due notice questions under Section 3 First (j) of the Railway Labor Act (*supra*, p. 2), and each time certiorari was denied. The court below properly held that Section 3 First (j) required the Board to give due notice of its proceedings to the incumbent of the position and his union. All the courts of appeals that have passed on the question have so ruled. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C. A. 3, 1951); *Estes* v. *Union Terminal*, 89 F. 2d 768 (C. A. 5, 1937); *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C. A. 7, 1951); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C. A. 8, 1950), certiorari denied, 340 U. S. 832.[3] To say that the incumbent and his union are not "employees involved" within the meaning of Section 3 First (j) "is so unrealistic as to be absurd." *Hunter* v. *Atchison T. & S. F. R. Co.*, 188 F. 2d 294, 300 (C. A. 7, 1951), certiorari denied, 342 U. S. 819. Petitioners rely (Pet. 14) on *Order of R. Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 156 F. 2d 1 (C. A. 8, 1946), certiorari denied, 329 U. S. 778, but that case was overruled by *Brotherhood of Railroad Trainmen* v. *Templeton*, *supra*, in which certiorari was also denied. Accordingly, there is no conflict of decision among the circuits.

2. Petitioners neglect to point out (Pet. 15) that only

[3] To the same effect, see *Brotherhood of Railroad Trainmen* v. *Swan*, 26 Labor Cases, Par. 68,481 (C. A. 7, 1954); *Allain* v. *Tummon*, 212 F. 2d 32 (C. A. 7, 1954); *Hunter* v. *Atchison T. & S. F. Ry. Co.*, 171 F. 2d 594 (C. A. 7, 1948), certiorari denied, 337 U. S. 916; *Nord* v. *Griffin*, 86 F. 2d 481 (C. A. 7, 1936), certiorari denied, 300 U. S. 673.

those receiving formal notice from the Board are permitted to participate before it (R. 42, 82). Consequently, actual knowledge of the proceedings would not suffice, for due process requires not only notice but an opportunity to be heard. *In re Central Railroad Co. of New Jersey*, 136 F. 2d 633, 639 (C. A. 3, 1943), certiorari denied, 320 U. S. 805. As was stated in *Allain* v. *Tummon*, 212 F. 2d 32, 35-36 (C. A. 7, 1954):

> Although we indicated in that opinion [*Hunter* v. *Atchison T. & S. F. R. Co.*, 188 F. 2d 294, 301, certiorari denied, 342 U. S. 819] that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process.

3. Judicial intervention was clearly warranted. For years the Board has refused to comply with the due notice mandate of Section 3 First (j) (R. 82, 83). In the instant case too, the Board had refused to give the required due notice and was proceeding to consider the merits (R. 46, 82).

Here the Board has glaringly departed from prompt and orderly procedure, and the respondents are endeavoring to obtain accomplishment of the purposes of the Act. In contrast to the cases relied upon by petitioners (Pet. 7-12), respondents are here trying to have the claim properly heard by the Board rather than to by-pass the Board. The whole purpose of this lawsuit is to have the Board decide the claim as soon as it gives the requisite notice.

This controversy arises because the Board is deliberately flying in the teeth of its known duty. In fact, it is persisting "with unabated fervor in its often criticized

practice". *Allain* v. *Tammon*, 212 F. 2d 32, 35 (C. A. 7, 1954). It is choosing to ignore the command of Section 3 First (j), as well as the myriad of judicial decisions thereunder. This is highlighted by the refusal of the Department of Justice to represent the Board in a similar case (R. 28-30). The Government neither joined in the appeal of this case nor the petition for certiorari.

The decision below does not interfere with the Board. All it does is require the Board to give formal notice to involved employees before proceeding further. Neither the district court nor the court of appeals made any attempt whatever to pass on the claim pending before the Board. They are merely insisting on the fair procedure specified in the statute and decisions thereunder.

Even if the Referee joined the Carrier Members in favoring due notice, still due notice would not be given to the incumbent or his union. The practice of the Board is never to give due notice unless all ten members concur. See concurring opinion in Award No. 6683, Appendix, *infra*. Therefore, the petitioners' contention that the Referee might still vote for due notice is entirely immaterial. In addition, the court below has held that the Referee is not entitled to vote on the due notice question. Certainly resolution of the basic question of due notice should not have to depend on whoever happens to be the Referee.

Petitioners' prematurity argument overlooks the point that the Board had no power to proceed until it complied with the statute. As the court below stated (R. 117):

> It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no

> concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong.

It is the recognized duty of the courts to act where, as here, there is "a jurisdictional frustration on the administrative level * * *". *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524.[4] As was said in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300:

> If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.

Here too, if the courts had no jurisdiction, there would be no remedy to enforce the command of Section 3 First (j).

Petitioners' argument against judicial intervention was well answered by the court below in stating (R. 118):

> Here, the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute. Nevertheless, we are urged to hold that it should be permitted to proceed to a hearing and

[4] See also *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 566; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187, 188; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562-563; *Chambers* v. *Robertson*, 183 F. 2d 144 (C. A. D. C., 1950), reversed on other grounds, 341 U. S. 37; *United States* ex rel. *De Lucia* v. *O'Donovan*, 178 F. 2d 876, 879-80 (C. A. 7, 1950), certiorari denied, 340 U. S. 886.

> a decision on the merits as a prerequisite to the right of a court of equity to interfere. Thus, a court before it can interfere must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic.

The contention (Pet. 10-11) that under the decision below, courts will have to resolve the question of which employees are entitled to due notice ignores all the decisions that have already determined that question (see p. 7, *supra*). Deadlocks on due notice have been caused, not by any confusion as to which employees should be given due notice, but by the obstinate refusal of some Board members to admit that Section 3 First (j) exists. Such deadlocks can be readily resolved by compliance with the instant decision.

4. The respondent carrier has no other adequate relief for a number of reasons. In the first place, the fact that it could defend against a suit to enforce the Board's decision on the ground that due notice was not given affords no real protection. Employees often resort to economic measures to enforce awards rather than risk enforcement suits. Carriers should not have to comply with invalid awards to avoid labor unrest and then have to pay other claimants who subsequently obtain valid awards. Even if a void award were set aside in enforcement proceedings, accumulated back-pay would be claimed in proceedings to enforce a later valid award reaching the same conclusion. Furthermore, if the carrier should secure reversal of a doubtful award in an enforcement action, the Board would still not issue the proper notice (R. 47, 82, 83; see also Appendix, *infra*), and this same action would have to be brought anew.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the respondent carrier would not be afforded protection in complying with an

award in favor of the claimant union. Yet a carrier should be entitled to have this controversy settled once and for all, in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards. Cf. *Kirby* v. *Pennsylvania Railroad*, 188 F. 2d 793, 799 (C. A. 3, 1951). It is grossly unfair for a carrier to be "double-barreled" by having conflicting awards against it, as happened in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C. A. 7, 1951), and as threatened here (R. 48). That is the answer to the following query posed by the court below (R. 119-120):

> It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.

In other words, due notice is withheld so that both organizations might secure favorable awards against a carrier.

The right to due notice, which is stated so explicitly in the statute, embodies elemental notions of justice and fair play that would apply even in the absence of statute. To deny those most vitally concerned in a controversy the right to be heard, as petitioners would do, subverts principles fundamental to the administration of the law. The courts of appeals have not disagreed as to their powers and duty in the premises. We earnestly submit, therefore, that no proper grounds have been asserted for the granting of this Court's writ of certiorari.

CONCLUSION.

The decision below was correct. Certiorari has been denied in five other cases involving due notice under the Railway Labor Act. There is no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July, 1954.

APPENDIX.

SPECIAL CONCURRING OPINION IN AWARD NO. 6683, DOCKET NO. CL-6614.

This is one of a line of four consecutive Awards entered by the Third Division on the same date. The full Opinion is found in Award No. 6680.

The referee makes reference in the full Opinion to what he calls the "Illinois Central case" and the "Allain case". These are respectively reported in 212 F. 2d 22 and 212 F. 2d 32. He points up the Court's language in the former case wherein it said, "At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard." And in all four of these Awards he has dismissed the claim. Therefore, we think that our Awards in this series are compatible with the first alternative expressed in the Opinion of the United States Circuit Court of Appeals.

This Board (Division) is a bipartisan creature of statute and is composed of five Carrier Members and five Labor Members. It employs, pursuant to the Railway Labor Act, an Executive Secretary. While its duty to give due notice is clearly expressed in the statute, the subject has proven to be of a most litigious character. The Executive Secretary has followed the practice of not giving due notice in those instances where it has been ordered by a referee Award unless the Labor Members' Chairman joins in giving him such direction. That direction has been withheld by the Labor Members of this Board irrespective of the many Court Cases holding the giving of notice to be our non-discretionary duty.

We can only look to the law and its interpretation by the Courts for our guide in the administration of our duty. Where that function is checked in the face of such a clear expression of our duty as lies before us in many cases, we are impelled to explain our position and concur in this referee's action, which we think is to "proceed no further" Similarly, when an Award has the effect of ordering due notice, and the actual giving of it is withheld, we are again of the opinion that we are still "proceeding no further". Surely, there can be no accumulation of liability under any claim beyond the point where this Board has failed to comply with what has been so effectively enunciated as its statutory duty.

E. T. Horsley,
R. M. Butler,
W. H. Castle,
C. P. Dugan,
J. E. Kemp.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY, IN OPPOSITION.

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July, 1954.

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IN THE

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OCTOBER TERM, 1954.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY, IN OPPOSITION.

OPINION BELOW.

The District Court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 80-86. The opinion of the Court of Appeals (R. 109-124) is reported in 212 F. 2nd 22.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 19, 1954 (R. 124). The petition for a writ of certiorari was filed June 11, 1954. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code as amended.

QUESTIONS PRESENTED.

1. Whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice of hearings to all "involved" employes.

2. Whether the incumbent of a position and his union are "involved" in a dispute before the Board between a railroad and another union claiming the same position.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

STATEMENT.

On June 12, 1951, the Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) instituted a proceeding against the Illinois Central Railroad Company (hereinafter called respondent) before the National Railroad Adjustment Board, Third Division (hereinafter called

the Board) (R. 45). That proceeding before the Board involves the right of the Telegraphers in and to a position at Palestine, Illinois, which position is presently filled by D. A. Shears, a member of the craft or class represented by the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks) (R. 45, 81).

After the Telegraphers' claim was filed with the Board, respondent was informed in writing by the General Chairman of the Clerks that in the event the employment rights of the present incumbent of the position in question were adversely affected by the claim filed by the Telegraphers, the Clerks would present and prosecute a claim against respondent based upon the same employment rights which are involved in the Telegraphers' proceeding (R. 48, 82).

There is no showing in the record that the incumbent of the position in question, D. A. Shears, has had notice, either actual or constructive, of the pending proceeding (R. 81).

On August 11, 1951, respondent filed its submission with the Board specifically setting forth, among other things, that the position involved was at that time occupied by a member of the Clerks and that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces on respondent's property and in the industry generally and that the claim was in reality one between the Telegraphers and the Clerks and should be dismissed unless the Board gave each organization an opportunity to present its side of the case (R. 45-56, 81).

The ten-member Board deadlocked on the merits of the Telegraphers' case. As a result the Mediation Board appointed a referee to resolve the deadlock on the merits pursuant to Section 3 First (l) of the Railway Labor Act (R. 44, 80-81).

On May 13, 1953, the proceeding before the Board came on for hearing. At that time the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Brotherhood of Railway Clerks was considered by the Board for the first time (R. 46, 81-82) through an objection made by a carrier member of the Board. He objected to proceeding with the case until the required due notice was served on involved employees whom he defined as "the Brotherhood of Railway Clerks, or constituents thereof" (R. 24, 25-26, 46, 81-82). Said carrier member of the Board further called the Board's attention to the fact that respondent had been served with a notice of the Clerks' "intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' organization is sustained" (R. 24).

Thereupon the Board went into an executive session to consider said objection. Pursuant to its custom the Board excluded all public members and the referee from the consideration of the due notice question (R. 26, 46, 82). At the hearing of the executive session the ten regular members of the Board voted on the objection to proceeding with the case in the absence of notice under Section 3 First (j). The result was a tie vote and therefore the objection failed to carry (R. 24, 25, 46, 82).

The public session of the Board was then reconvened. In accord with the usual practice of the Board the referee was not requested to vote on the due notice question, nor did he request an opportunity to do so although the vote on the question had resulted in a tie (R. 24, 46, 82). Thereafter, the same carrier member again objected to further proceeding until the Board had given notice pursuant to Section 3 First (j) of the Railway Labor Act. Notwithstanding said objection the hearing was resumed (R. 46, 82).

On May 22, 1953, respondent filed a verified Complaint in the District Court (R. 2) and thereafter moved for an order directing the Board to serve due notice upon D. A. Shears and upon the Brotherhood of Railway Clerks, or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 5).

In the verified Complaint respondent set forth that for several years the Board has denied and continues to deny the right of participation in proceedings before it to any persons not formally served with notice and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 47).

The Telegraphers were permitted to intervene and file an Answer (R. 15-20). The Carrier Members of the Board also filed an Answer to the Complaint (R. 21-43).

In their Answer the five Carrier Members of the Board admitted:

(a) That Section 3 First (j) of the Railway Labor Act requires due notice be given to D. A. Shears and the Clerks (R. 21).

(b) That the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 21).

(c) That the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed 212 F. 2nd 32, C. A. 7 (1954) on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 21-22, 28-30, 115).

(d) That the five Carrier Members are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 22).

(e) That only persons receiving due notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 23) and that persons having merely actual notice of proceedings before the Board are not permitted to participate therein (R. 42).

After considering the pleadings, exhibits and briefs (R. 85) the District Court entered findings of fact and conclusions of law in favor of respondent (R. 80-84) and issued a preliminary injunction which enjoined the Board from proceeding with the defendant Telegraphers' claim (a) until the Board gives formal notice to D. A. Shears and the Clerks and (b) permits said persons to participate in the proceedings before the Board (R. 85-86).

The Labor Members of the Board and the Telegraphers, petitioners herein, appealed from the order of the District Court (R. 89) but the Government did not appeal. The Court of Appeals affirmed the order of the District Court, Judge Swaim dissenting (R. 109-124).

ARGUMENT.

The issue in this case is si ngularly limited and no amount of strained statutory construction can convert it into one warranting review by this Court on certiorari. Petitioners cling to two basically erroneous misconceptions:

1. That Section 3 First (j) of the Railway Labor Act does not mean what it says; and
2. That the present incumbent of the position at issue before the Board and the union representing that individual are not "involved" persons in the proceeding pending before the Board.

Without these erroneous conclusions petitioners' case must fall.

To focus attention on precisely what is offered as an issue for this Court's determination, it should be pointed out that the District Court and the Court of Appeals have not interfered with the discretionary process of the Board, but on the contrary have merely insisted that the Board comply with a ministerial duty imposed by mandate of Congress in order that the Board's process be valid. Section 3 First (j) of the Railway Labor Act clearly imposes a duty upon the Board to serve notice of proceedings pending before it on "involved" persons.

Petitioners do not deny that both the Clerks and the Telegraphers claim the same position at Palestine, Illinois, nor is it denied that the Board proceeded to determine the Telegraphers' claim without first serving notice of such claim upon the present incumbent of the job or upon the Clerks; nor is it denied that there is no proof that the incumbent of the job had notice of the proceeding filed by the Telegraphers; nor is it denied that the Clerks and

the incumbent of the job could not have participated in the proceedings before the Board without formal notice.

On these facts, the decision of the court below was manifestly correct. As will be hereinafter pointed out, there is no conflict of decisions, and the decision below was required by the language of the Act and its legislative history.

The Decision Below Is Clearly Correct.

1. After a searching examination of the entire record and a thorough analysis of the law as announced in similar cases, the District Court and the Court of Appeals concluded that the Board was clearly required by Section 3 First (j) of the Railway Labor Act to give notice of the dispute filed by the Telegraphers to the incumbent of the job in question and to his union. The Courts below properly found that the plain and unambiguous language contained in the statute indicated Congress intended to safeguard the rights of all persons who might be affected by an award by requiring the Board to give notice as a prerequisite to obtaining jurisdiction. The legislative history of the Act and all Courts of Appeal that have passed on the question have so indicated. Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. (1934) p. 51; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Estes* v. *Union Terminal*, C. A. 5 (1937), 89 F. 2nd 768; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railroad & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 842.

The statutory requirement that the Board "give due notice * * * to the employee or employees * * * involved in any disputes submitted to them" is one of the ministerial duties imposed upon the Board, which duty must be met before the Board obtains jurisdiction. The language employed in the Act prescribes and defines the duty with such precision and certainty that nothing is left to the exercise of the Board's discretion or judgment. In other words, the duty is so plainly prescribed as to be a positive command to the Board, which command must be obeyed before it can obtain jurisdiction over the merits of the case. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793, 799.

2. As the Clerks and D. A. Shears are "involved" in the proceeding before the Board, notice must be served upon each of them. The Telegraphers' claim filed with the Board involves the employment rights to the position now filled by D. A. Shears (R. 81). In other words, the Telegraphers are claiming the right to the same work being done by Shears and would, if successful, supplant his right and that of the Clerks in and to the job at Palestine. Under these circumstances there can be no doubt that the present incumbent of the position at issue in the proceeding before the Board and his union are "involved" within the meaning of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)]. The courts have uniformly held that under similar conditions those whose jobs and job rights are sought or affected by the claims of others are "involved" within the meaning of Section 3 First (j). *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2nd 294, 300-301, certiorari denied, 342 U. S. 819; *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2nd 768, 770; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, 534.

3. Petitioners contend that even if notice is required, actual knowledge of the proceedings is sufficient (Pet. 15). Petitioners, however, fail to inform the Court: (a) there is no showing that D. A. Shears, the incumbent of the position, has any knowledge of the proceeding before the Board (R. 81); and (b) only those receiving formal notice from the Board are permitted to participate in the proceedings before the Board (R. 42, 82).

It is well established that the incumbent of the position involved, as well as the union representing that individual, is entitled to notice (see *supra*, pp. 8-9); accordingly, petitioners' contention loses all force, in view of an absence of showing of actual notice on the part of Mr. Shears.

Where an administrative body, such as the Railroad Adjustment Board, acts judicially, notice and opportunity for hearing are indispensable for due process. The obvious purpose of the notice required by the Act is to assure to each employe who may be affected by a decision of the Board the guarantee of due process. However, since the Board will not permit participation by any other than those who have received formal notice of the proceedings (R. 42, 82), "actual notice" does not fulfill the purpose of the notice required by Sec. 3 First (j) of the Act.

This principle was recognized in *In Re Central Railroad Company of New Jersey*, C. A. 3 (1942), 136 F. 2d 633, 639, cert. den. 320 U. S. 805, where it was stated:

> "A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear and you shall be heard; and, when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard."

To the same effect, in *Allain* v. *Tummon*, C. A. 7 (1954),

212 F. 2d 32, under a factual situation strikingly similar to the case at bar, the court said (p. 36):

> "Although we indicated in that opinion [*Hunter* v. *Atchison, T. & S. F. Railway Co.*, 188 F. 2d 294, 301] that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

4. The court below did not decide a controversy growing out of a duty performed under the Railway Labor Act, but only decided a controversy involving a refusal by the Board to discharge a substantive duty which the Railway Labor Act exacts. Consequently the cases cited by petitioners in support of the proposition that where a particular judicial remedy is specified for the review of administrative action, the specification of such remedy precludes any other (Pet. 12-13) are not applicable to the case at bar. Those cases concern actions by an administrative agency which involve the exercise of discretion or judgment. The case at bar involves the refusal of the Board to follow the positive mandate of Congress. In *Wilbur* v. *United States*, 281 U. S. 206, 218-219, this Court has previously recognized this differentiation between duties which are purely ministerial and those which involve the exercise of judgment and discretion stating:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> "The duties of executive officers, such as the Secre-

> tary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. *Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus*, unless there be provision or implication to the contrary." (Emphasis supplied.)

See also: *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *Order of Railway Conductors* v. *Swan*, 329 U. S. 520; *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123; *United States, ex rel. De Lucia* v. *O'Donovan*, C. A. 7 (1950), 178 F. 2nd 876, certiorari denied 340 U. S. 866; *Chambers* v. *Robertson*, C. A. D. C. (1950), 183 F. 2nd 144, reversed on other grounds 341 U. S. 37; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kansas City Southern Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178.

5. Petitioners suggest (Pet. 10-11) that the decision below transfers to the courts the resolution of questions vested in the Board for initial decision. This contention was properly considered by the Court of Appeals as pure sophistry; it stated (R. 117):

> "This argument, if it can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than

restrain the Board from proceeding until it has complied with the statutory command."

This case does not involve a departure from the rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive. On the contrary, respondent merely requested and the Court below only required the Board to follow the mandate of Congress in order that the Board might retain jurisdiction and issue a valid and binding award that would give respondent the protection to which it is entitled. This case involves the wilful refusal of the Third Division of the Board to comply with the positive command of Congress as expressed in Section 3 First (j) of the Railway Labor Act. Certainly Congress must have intended that there be some remedy if the Board failed to observe that command. However, if the federal courts cannot require compliance by the Board under their general jurisdictional powers, there would be no remedy available. This Court has previously passed upon a like question in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, where it was said, page 300:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

See also: *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of*

Railway & Steamship Clerks, C. A. 7 (1951), 188 F. 2nd 302, 305; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2nd 481, 483-484, certiorari denied 300 U. S. 673.

6. Petitioners further suggest that the statutory defense to an enforcement suit affords respondent ample protection. In recognizing the fallacy of this contention, the court below stated (R. 118-119):

> "The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights. The reasoning in *Kirby et al.* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799, is pertinent, wherein the court stated: 'Until the statutory requirements are met, it [the Board] has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies.'"

Although the foregoing is a complete answer to Petitioners' contention, it does not take into consideration the further fact that it is not uncommon for labor organizations to forego "judicial enforcement" of an award, whereby a carrier may obtain court review, in favor of "economic enforcement," whereby the carrier has no opportunity for court review. Economic enforcement exercised in the form of strikes and strike threats often leaves the carrier with

no choice other than to comply with an award which it knows to be invalid if it is to avoid labor unrest.

Respondent has already been advised in writing by the Clerks that said organization considers the position in question as one properly within its scope and that it will prosecute before the Board a claim for the position in the event respondent is unsuccessful in defending the pending claim of the Telegraphers (R. 48). This fact was made known to the Board (R. 24) but in spite of such knowledge it persists in its refusal to serve the required notice. In the Clerks' case the Board would likewise refuse to serve notice upon the Telegraphers (R. 47, 82 and 83). Both of these controversial matters, however, can and should be determined by the mere expedient of the Board giving formal notice as required by statute and permitting involved persons to participate in the proceedings. *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302. The Board can then determine which contract applies or whether both apply.

In addition, the claim of the Telegraphers which is pending before the Board seeks, among other things, back wages. A final award on the present record would be void due to the failure of the Board to comply with Section 3 First (j) of the Railway Labor Act (*Kirby* v. *Pennsylvania R. Co.*, C. A. 7 (1950), 188 F. 2nd 793, 799) but if there is merit in the Telegraphers' claim, the wilful failure of the Board to follow the jurisdictional mandate of the statute will delay ultimate decision and the period during which double payments for one position would be claimed. This period undoubtedly would be further prolonged by wilful failures on the part of the Board to comply with the notice provision in subsequent proceedings, for, if the Board

cannot be compelled to comply with the jurisdictional requirement in this instance, it could not be required to comply with jurisdictional requirements in subsequent proceedings.

There Is No Conflict of Decisions.

The requirement of due notice contained in Section 3 First (j) of the Railway Labor Act is but a reiteration of one of the oldest basic principles in our form of government, *i.e.* the assurance of due process of law to each person who may be affected by a decision of a court or of an administrative body acting judicially. Courts of Appeals in all parts of the country have had no difficulty in so interpreting that Section. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2nd 793; *Estes* v. *Union Terminal*, C. A. 5 (1937), 89 F. 2nd 768; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, C. A. 7 (1951), 188 F. 2nd 302[1]; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 832. Petitioners' suggestion that the decision below is in conflict with the holdings in other circuits is without foundation in fact. In support of this contention petitioners cite *Order of Railroad Telegraphers* v. *N. O. T. & M. R. Co.*, C. A. 8 (1946), 156 F. 2nd 1, certiorari denied 329 U. S. 758. That case, however, was decided in 1946 and is no longer the latest authoritative expression of the Court of Appeals for the Eighth Circuit. In *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2nd 527, certiorari denied 340 U. S. 832, the Court of Appeals for the Eighth Circuit again had occasion to pass upon the question of the notice required in proceedings

1. For other cases from this Circuit see: *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2nd 32; *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, C. A. 7 (1948), 171 F. 2nd 594, certiorari denied 337 U. S. 916; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2nd 481, certiorari denied 300 U. S. 673.

before the National Railroad Adjustment Board. This latter case overruled the *N. O. T. & M.* case and held that certain awards of the Board were illegal and void because involved employes were not given notice of the proceeding before the Board nor afforded an opportunity to be heard in such proceedings. Accordingly, there is no conflict of decisions among the circuits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOSEPH H. WRIGHT,
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July, 1954.

SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHET AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION OF RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE OF THE FOLLOWING ORGANIZATIONS:

American Train Dispatchers' Association; Railway Employes' Department, A. F. of L.; International Association of Machinists; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers' International Association; International Brotherhood of Electrical Workers; Brotherhood Railway Carmen of America; International Brotherhood of Firemen & Oilers; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Maintenance of Way Employes; Hotel & Restaurant Employees and Bartenders International Union; Railroad Yardmasters of America; Brotherhood of Sleeping Car Porters; and Brotherhood of Railroad Signalmen of America.

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Dated at Chicago, Illinois, this 27th day of January, 1955.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now comes Illinois Central Railroad Company, one of the respondents in the above-entitled cause, and files this its objection to the motion of American Train Dispatchers' Association, *et al.*, for leave to file a brief as *amici curiae* and as reasons therefor states as follows:

I. Rule 42, Section 3, of this Court provides in part that a motion for leave to file a brief as *amici curiae* shall "* * * set forth facts or questions of law that have not been, or reasons for believing that they will not adequately

be, presented by the parties, and their relevancy to the disposition of the case; * * *." In the motion of American Train Dispatchers' Association, *et al.*, it is stated (p. 4), "* * * we are confident that respondents' contentions here will be capably opposed by counsel for the petitioners, * * *." It thus appears that movants do not comply with Rule 42, Section 3. Although movants allege that other issues will necessarily be raised by the parties, they fail to state what those issues are and in the preceding part of their motion indicate that the issues are the same as those raised by the petitioners.

II. Movants assert (p. 4) that they "may fairly be said to represent railroad labor as a whole". This is not a fact. Not a single operating union has joined in the motion and brief of the *amici*. The following members of the Railway Labor Executives' Association failed to join in the aforesaid motion:

Brotherhood of Locomotive Firemen and Enginemen;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
National Organization Masters, Mates & Pilots of America;
Order of Railway Conductors; and
Switchmen's Union of North America.

Likewise, the following railroad labor organizations did not join therein:

Amalgamated Association Street, Electric Railway and Motor Coach Employees of America, AFL;
American Brotherhood of Railway Police;
American Federation of Technical Engineers;
American Railway Supervisors Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Railroad Shop Crafts of America;
Brotherhood of Railroad Trainmen;
Great Lakes Licensed Officers' Organization;
Inland Boatmen's Union of the Pacific;

International Association of Railway Employees;
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers;
International Longshoremen's Association;
International Union of Steam and Operating Engineers;
National Maritime Union;
Railroad Industrial Union;
Railroad Yardmasters of North America;
Railway Patrolmen's International Union, AFL;
Seafarers' International Union of North America;
United Mine Workers, District 50;
United Transport Service Employees;
United Railroad Workers of America, CIO; and
Utility Workers Organizing Committee.

In fact the Brotherhood of Railroad Trainmen, which is one of the oldest and strongest of all railroad unions, agrees with the position of respondents herein, for it successfully filed a similar mandamus action against the First Division of the Board in *Brotherhood of Railroad Trainmen* v. *Swan*, C. A. 7 (1954), 214 F. 2d 56.

III. Although the points urged by movants are similar in nature to those urged by petitioners, most of the issues posed are not presented in the case at bar, the only issue here being whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice, and an opportunity to be heard, to the employees involved in the dispute and to the labor union that represents his craft or class.

IV. Movants have mis-stated the position of respondent Illinois Central Railroad Company. It is not our position "that the Adjustment Board may in effect rewrite the agreement of the claimant craft, and the other craft or crafts thus brought in as third parties, so as to eliminate any conflict or overlapping in the agreements" (p. 3). It is the position of respondent, Illinois Central,

that the Board is bound by the plain, unambiguous language of the statute and of this Court in the cases of *Order of Conductors* v. *Pitney*, 326 U. S. 561, and *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

WHEREFORE, respondent respectfully prays that the motion of American Train Dispatchers' Association, *et al.*, to intervene as *amici curiae* be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE.

I, JOHN W. FOSTER, one of the attorneys for the respondent Illinois Central Railroad Company, do hereby certify that on the 27th day of January, 1955, I served the attached objection to the motion for leave to file brief as *amici curiae* upon all parties of record herein by depositing copies thereof in the United States Mail, via Airmail, postage prepaid, addressed to Milton Kramer and Lester P. Schoene, Schoene & Kramer, 1625 K Street, N. W., Washington 6, D. C., Attorneys for Petitioners; Clarence M. Mulholland, Edward J. Hickey, Jr. and Richard R. Lyman, Mulholland, Robie & Hickey, 714 National Bank Building, Toledo 4, Ohio, Attorneys for *Amici Curiae;* and by depositing a copy thereof in the United States Mail, regular mail, postage prepaid, to: Walter J. Cummings, Jr., Sidley, Austin, Burgess & Smith, 11 South LaSalle Street, Chicago 4, Illinois, Attorneys for Respondents William H. Castle, R. M. Butler, C. P. Dugan, E. T. Horsley and J. E. Kemp.

JOHN W. FOSTER.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 131

J. W. WHITEHOUSE, Et Al.,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Et Al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, Et Al.,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Et Al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT CARRIER MEMBERS, NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION

OPINION BELOW

The district court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 35-41. The opinion of the court of appeals (R. 45-60) is reported in 212 F. 2d 22.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on March 19, 1954 (R. 60). The petition for a writ of certiorari was filed on June 11, 1954, and was

granted on October 14, 1954 (R. 63). The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

QUESTIONS PRESENTED

1. When a union files a contractual claim with the National Railroad Adjustment Board to certain railroad work being performed by a member of another union also having a contract with the railroad, whether Section 3 First (j) of the Railway Labor Act requires the Board to give due notice and an opportunity to be heard to the incumbent and his union.

2. When the Board refuses to give due notice and an opportunity to be heard, whether the courts may enforce the statutory command.

STATUTE INVOLVED

Section 3 First (j) of the Railway Labor Act (45 U. S. C. 153 First (j)) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

STATEMENT

In June 1951, petitioner Order of Railroad Telegraphers (herein referred to as Telegraphers) instituted a proceeding in the National Railroad Adjustment Board, Third Division (herein referred to as the Board), claiming work at Palestine, Illinois, on the line of respondent Illinois Central Railroad. That work is presently being done by D. A. Shears, a member of the Brotherhood of Railway and Steamship

Clerks, Freight Handlers, Express and Station Employes (herein referred to as Clerks). (R. 28, 36.)

After the Telegraphers' claim was docketed by the Board, the Clerks wrote the respondent carrier that the work in question was covered by a contract between the Clerks and the Carrier, and that if the Telegraphers were successful in their claim before the Board, the Clerks would present to the Board a claim to the same work (R. 30-31, 38).

In August 1951, the respondent carrier filed its submission with the Board, stating, *inter alia*, that the work was being done by a member of the Clerks, that the work was of the type customarily performed by clerical forces, and that the claim should be dismissed unless the Board permitted each organization to present the full facts of the case (R. 28, 36-37).

The ten-member Board deadlocked on the merits of the case (R. 46). Consequently, the National Mediation Board appointed a referee to resolve that deadlock, pursuant to Section 3 First (1) of the Railway Labor Act (R. 27, 36).

On May 13, 1953, when the case came on for hearing before the Board and the Referee, the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered for the first time (R. 28-29, 37).

The due notice point was the subject of a motion of a respondent Carrier Member, who objected to proceeding with the case until due notice was served on "the Brotherhood of Railway Clerks, or constituents thereof" (R. 18, 19-20, 28-29, 37). He pointed out that the Clerks had warned the respondent carrier of their intention to prosecute a claim to the same work involved in the proceeding before the Board in the event that the Telegraphers' claim were sustained by the Board (R. 18).

Pursuant to its custom when considering matters of procedure, the Board excluded the Referee from consideration of the due notice question (R. 20, 29, 37). At this executive session of the Board, the Carrier Member's motion that the Board not proceed with the claim "for want of jurisdiction" resulted in a tie vote and therefore failed to carry (R. 19, 20, 29, 37).

The public session of the Board was then reconvened with the Referee present. In accord with the usual practice of the Board, the Referee was not requested to vote on the due notice question, nor did he request an opportunity to do so. (R. 18-19, 29, 37.)

After the public session reconvened, a respondent Carrier Member again objected to proceeding until due notice had been given pursuant to Section 3 First (j) of the Railway Labor Act. Nevertheless, the hearing was resumed. (R. 29, 37.)

On May 22, 1953, the respondent carrier filed a verified Complaint (R. 1) and thereafter moved for an order directing the defendants to serve due notice on the incumbent D. A. Shears and the Clerks or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 3).

In the Complaint, the respondent carrier alleged that the Board has for several years denied the right of participation of any persons not formally served with notice, and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 30).

The Complaint pointed out that the Telegraphers were seeking to obtain a favorable Award on their claim, with no notice to the Clerks, and that the Clerks would then in turn seek a favorable Award, with no notice to the Teleg-

raphers.[1] Thus the Telegraphers and Clerks would endeavor to compel the respondent carrier to employ two persons simultaneously on one job. (R. 31.)

The five respondent Carrier Members of the Board filed an Answer admitting that under Section 3 First (j) of the Railway Labor Act due notice must be given to D. A. Shears and the Clerks. Their Answer showed that the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 16), and also showed that the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill., 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954), on the ground that this Division's failure to give due notice deprived employees of their constitutional and statutory rights. (R. 16-17, 23-35, 51.)

In their Answer, which was supported by six exhibits (R. 18-26), the five respondent Carrier Members asserted that they are willing to serve the requisite due notice but that the five Labor Members are unwilling to do so (R. 17).

The Carrier Members disclosed that only persons receiving formal notice from the Board pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 17-18).

The district court entered findings of fact and conclusions of law in favor of the respondent carrier (R. 35-40). Accordingly, a preliminary injunction was awarded which enjoined the Board from proceeding with this claim (1) until the Board gives formal notice to D. A. Shears and

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1. A chain of events of this very kind was described in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 303 (C. A. 7, 1951).

the Clerks, and (2) until the Board permits them to participate in the proceedings (R. 40-41).

Intervenor Telegraphers and the Labor Members appealed from the order of the district court insofar as it applied to individual Board members (R. 42), but the Board did not appeal (R. 49). The court of appeals affirmed the order of the district court, Judge Swaim dissenting (R. 45-60).[2]

In January of this year, some of the members of the Railway Labor Executives' Association moved to file a brief amici curiae herein. Respondents did not consent to the filing of the brief because the points therein have already been made by the petitioner Order of Telegraphers, which is a member of that Association, and because the proposed brief of the amici curiae does not represent the viewpoint of railroad labor as a whole. Not a single operating union has authorized its name to be used by the amici.

Among others, the following important members of the Railway Labor Executives' Association failed to join in the aforesaid motion: the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, and the Switchmen's Union of North America. Likewise, 22 other railroad labor organizations did not join therein, including the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen.

The aforesaid Brotherhood of Railroad Trainmen, one of the oldest and strongest of all unions, agrees with the position of respondents, for it successfully filed a similar

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2. It may be noted that Judge Swaim concurred in the subsequent opinion in *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954), which required the district court at the Brotherhood's behest to order the Board to give due notice to express-messengers and permit them to participate before the Board.

mandamus action against the First Division of the Board *(Brotherhood of Railroad Trainmen* v. *Swan,* 214 F. 2d 56 (C.A. 7, 1954)), and that Division now gives statutory notice to incumbents and their unions in dockets such as the instant one (see R. 21-23).

Although this Court has not yet acted on the motion of the amici, the arguments of the proposed brief of the amici have been answered herein.

Because the National Railroad Adjustment Board is a unique agency, and because there has been very little literature on its operations, the respondent Carrier Members call the Court's attention to the two most recent articles to analyze these operations: Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis" (1952) 5 Industrial & Labor Relations Rev. 365, beginning particularly at 372 ff.; "Railroad Labor Disputes and the National Railroad Adjustment Board" (1951) 18 Univ. of Chicago L. Rev. 303, beginning particularly at 308 ff.

SUMMARY OF ARGUMENT

I.

When a union files a contractual claim with the National Railroad Adjustment Board to certain railroad work being performed by a member of another union also having a contract with the railroad, Section 3 First (j) of the Railway Labor Act requires the Board to give the incumbent and his union notice and an opportunity to participate. Except for an inapplicable and overruled decision by the Eighth Circuit, all the cases, representing the views of 26 federal judges, have so interpreted the statute.

If Congress had intended that notice and an opportunity to be heard should be limited to parties, the statute would have said so. Instead, it provides that notice of hearings should be given to "employees * * * involved in any dispute submitted" to the Board by the parties.

The incumbent is an "employee involved" because he will be displaced if the claimants are successful. Similarly, his union is involved, for it has already stated that it will prosecute a claim to the same work, and the legislative history of the statute shows that it should be given an opportunity to be heard. The Department of Justice has refused to represent the Board in due notice litigation on the ground that the Board's failure to give due notice deprives employees of constitutional and statutory rights. After giving the statutory notice and an opportunity to be heard to the incumbent and his union, and after considering custom, practice, and usage under the agreements, the Board should decide which of the two collective bargaining agreements applies to this work, or whether both do, thus avoiding an additional dispute brought by the Clerks.

II.

Formal notice to the incumbent and his union is necessary because the Board would not permit them to participate in the proceedings if they merely had actual notice.

III.

The preliminary injunction was warranted because the Board has already voted not to give the statutory notice. The respondents have already exhausted the administrative process on this matter. Even if the referee had subsequently voted that notice be given, no notice would have issued, for the practice of the Board is not to give notice unless the Board is unanimous.

The rule requiring the exhaustion of administrative remedies does not apply (1) where, as here, the administrative body has failed to comply with the governing statute and has, therefore, acted without statutory authority, or (2) where the defect urged goes to the jurisdiction of the administrative agency. See, *e.g.*, *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557.

The Board's persistent deadlock on due notice has increased the number of unresolved claims and is the kind of "judicial frustration on an administrative level" appropriate for resolution by the court. *Order of Railway Conductors* v. *Swan*, 329 U. S. 520. Judicial relief is necessary to rectify the Board's flagrant disregard of the notice requirements of Section 3 First (j).

No case has held that when the Board fails to give due notice, the only remedy available to the carrier is to defend an enforcement suit filed within two years after an award is issued. Defending an enforcement suit would not result

in the serving of notice, and it would still be necessary to file another action like the present one in order for due notice to be given. Moreover, incumbents and their unions would not be parties to an enforcement suit, so that a court would not know their views and no binding adjudication could be made.

For lack of notice to the incumbent and his union, a "denial award" in the carrier's favor would be void and afford it no protection. Since the denial award would be void, the member of the Telegraphers who is seeking this work, or the Telegraphers, would feel free to file an identical claim or to exert strike threats against the carrier.

If a void "sustaining award" on the merits issues against the carrier, experience teaches that economic duress may be asserted against the carrier instead of the filing of an enforcement suit. Yet a carrier should not have to comply with invalid awards to avoid labor unrest and then have to pay retroactively other claimants who subsequently obtain valid awards after due notice has been given.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the carrier would not be afforded protection in complying with an award in favor of the claimant union. But a carrier should be entitled to have this controversy settled once and for all in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards.

Relief in the nature of mandamus is necessary to cause the Board to give the notice required by the Railway Labor Act, and it is well settled that the courts have jurisdiction to enforce the commands of that statute. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. The statu-

tory right to due notice embodies elemental notions of justice and fair play. To deny those most vitally concerned in the controversy the right to be heard subverts principles fundamental to the administration of the law.

IV.

The writ of certiorari should be dismissed because of several features appearing in the record of this case.

The petition for certiorari was not presented by the Board but only by five individual members of the Board, who do not constitute a majority of the Board and do not purport to be acting for the Board. Public policy and judicial convenience weigh against allowing individual members to carry a case through the courts when the agency itself did not appeal. Moreover, the appeal in this case concerned only the injunction against these individual members and not the injunction against the Board, so that this Court does not have before it the subject matter discussed in the briefs.

The Order of Telegraphers, the only other petitioning party, is an intervenor that was not sued, was not enjoined, and does not have an independent right which will support an appeal. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632; *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577.

ARGUMENT

I. THE BOARD IS REQUIRED TO GIVE DUE NOTICE AND AN OPPORTUNITY TO BE HEARD TO THE INCUMBENT AND HIS UNION.

The nub of this case is: Should a railroad employee and his union, under Section 3 First (j) of the Railway Labor Act, be given notice by the Board and an opportunity to be heard in proceedings initiated by another union trying to take the work from him?

The Board consists of five carrier members and five labor members. When a union files a contractual claim with the Board to certain railroad work being performed by a member of another union also having a contract with the railroad, it is the Carrier Members' position that Section 3 First (j) of the Railway Labor Act requires the Board to give the incumbent and his union notice and an opportunity to participate in the hearings. Then the Board may properly consider both contracts in the light of custom, practice and usage under each of them to determine which applies to the work, or whether both do. When, as here, the Board refuses to give the requisite notice, judicial relief is needed so that the Board will comply with the statutory mandate. Twenty years' experience has shown that there is no other way to secure an observance of the notice requirements of the Act.

In the proceedings before the Board, notice was not given by the Board to the Clerks (R. 37), who claim that their contract covers the Palestine, Illinois, work (R. 30-31, 38), nor to the incumbent clerk whose job is at stake, D. A. Shears (R. 37), despite the requirements of Section 3 First (j) of the Railway Labor Act that:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and *the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees* and the carrier or carriers *involved in any dispute submitted to them.*" (Italics supplied.) (45 U. S. C. 153 First (j).)

The holding of the courts below that Section 3 First (j) requires the Board to give due notice of its proceedings to the incumbent of the position and his union accords with the decisions in other circuits. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C.A. 3, 1951); *Estes* v. *Union Terminal*, 89 F. 2d 768 (C.A. 5, 1937); *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823.[3] The respondent Carrier Members, who comprise half the Board, sought to comply with this statutory obligation and the decisions of 26 federal judges who have thus interpreted the statute.

Petitioners are mistaken in their statement that until this case it has never been suggested, administratively or judicially, that an incumbent was entitled to notice (Br. 35). That question was first decided in *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7, 1936), certiorari denied, 300 U. S. 673,

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3. To the same effect, see *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954); *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7, 1954); *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway Trainmen and Steamship Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 171 F. 2d 594 (C. A. 7, 1948), certiorari denied, 337 U. S. 916; *Nord* v. *Griffin*, 86 F. 2d 481 (C.A. 7, 1936), certiorari denied, 300 U. S. 673; *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Ry. Co.*, 26 Labor Cases ¶ 68,622 (E.D. Mo., 1954); *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654 (N.D. Ill., 1954); *Brand* v. *Pennsylvania Railroad*, 2 Labor Cases 179 (E.D. Pa., 1939). The reason for so many cases in the Seventh Circuit is that the Board's members and officers are in Chicago, Illinois (see Section 3 First (r) of the Railway Labor Act).

and all subsequent cases have followed that pioneer decision except for an inapplicable decision in the Eighth Circuit which did not discuss Section 3 First (j) and which has since been overruled (see below). Moreover, numerous awards of the Board are to the same effect (see p. 43, *infra*), and even the motion of the amici curiae refutes (at p. 3) the petitioners' statement that this is the first such case.

The Telegraphers' submission to the Board demands that the work now being performed by the incumbent clerk Shears be transferred to the Telegraphers' agreement. If the Board sustains the claim of the Telegraphers, it will necessarily transfer the work from the incumbent Shears, who is subject to the Clerks' agreement, to a telegrapher who is subject to the Telegraphers' agreement. That being so, Shears and the Clerks would be adversely affected by the award and therefore should be given notice and opportunity to be heard.

To say that the incumbent and his union are not "employees involved" within the meaning of Section 3 First (j) "is so unrealistic as to be absurd." *Hunter* v. *Atchison, T. & S. F. Ry Co.*, 188 F. 2d 294, 300 (C.A. 7, 1951), certiorari denied, 342 U. S. 819. The only allegedly contrary authority, relied upon by petitioners (Br. 28-30), is *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 61 F. Supp. 869 (E.D. Mo., 1945), affirmed, 156 F. 2d 1 (C.A. 8, 1946), certiorari denied, 329 U. S. 758. However, that case was overruled by *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823, where it was unsuccessfully relied upon by the appellant. The recent case of *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 26 Labor Cases ¶ 68,622 (E. D. Mo., 1954), was decided pursuant to the *Templeton* case rather than pursu-

ant to the earlier *New Orleans, Texas & Mexico Railway* case. Petitioners attempt to distinguish the *Templeton* case from the earlier *New Orleans, Texas & Mexico Railway* case on the asserted ground that the baggagemen's work was not covered by a contract in the *Templeton* case (Br. 32), but such distinction was not made by the court, and the baggagemen had a contract with one of the carriers. Moreover, instead of discussing the notice requirement of Section 3 First (j), the overruled *New Orleans, Texas & Mexico* holding was predicated on the erroneous conclusion that the Board has no jurisdiction to decide claims of this type (see 61 F. Supp. at pp. 878-879; 156 F. 2d at p. 5). It has been decided that the Board does have such jurisdiction. *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 188 F. 2d 302 (C.A. 7, 1951); *Brennan* v. *Delaware, L. & W. R. Co.*, 303 N. Y. 411, 103 N. E. 2d 532 (1952), certiorari denied, 343 U. S. 977.

Petitioners contend (Br. 27-38) that the phrase "employees involved" in Section 3 First (j) covers only the claimant union and the carrier. Such a construction is at war with the wording of the Section, which was construed as follows in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 734-735:

> "* * * § 3 First (j) not only requires the Board to give 'due notice of all hearings *to the employee* . . . involved in any dispute *submitted* . . .,' but provides for 'parties' to be heard 'either *in person*, by counsel, or by other representatives, as they may respectively elect.'
>
> "These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be

> heard 'in person.' Nor would the provision for notice *'to the employee . . .* involved in any dispute' be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose." (Court's italics.)

If Congress had intended that notice and an opportunity to be heard should be limited to parties, the statute would have said so. Instead, it provides that notice of hearings should be given to "employees * * * involved in any dispute submitted" to the Board by the parties. Congress made no attempt to restrict the hearings to the claimant and carrier but realized that others might be interested persons with a right to notice and hearing.

It is impossible to conceive of anybody more entitled to notice and hearing than an incumbent employee whose job is sought in a claim and the union that holds the contract to which he is subject. The relief the Telegraphers are requesting from the Board would result in D. A. Shears' displacement. "We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees" (*Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 306 (C.A. 7, 1951)). "Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him" (*Hunter* v. *Atchison, T. & S. F. Ry. Co.,* 188 F. 2d 294, 300 (C.A. 7, 1951), certiorari denied, 342 U. S. 819). Therefore, it is obvious that the incumbent is entitled to notice under Section 3 First (j). Petitioners' view that it is unnecessary to give notice to this incumbent because he is a member of the Clerks (Br. 35-38) means that

union men such as Shears do not deserve the procedural safeguards to which non-union men are entitled.

Similarly, Shears' union, the Clerks, should receive notice, for it contends that the work in question is covered by a contract between the carrier and the Clerks (R. 38), and it contends that Shears is properly working under that contract. Therefore, the Clerks are vitally interested in this work being available to their members. Since the Clerks have rights under their contract which might be affected by the award herein, they are "involved" and should receive notice.

It seems disingenuous for petitioners to contend (Br. 27-35) that the Clerks have no interest and are not involved in this dispute. This contention entirely disregards the Clerks' letter to the carrier stating that if the Telegraphers win the instant claim, the Clerks will prosecute a claim to the same work (R. 30-31, 38). In addition, the Clerks are so interested in this dispute that they have seen fit to join in the brief of amici curiae herein.

The carrier's submission to the Board contended that the work in question was plain, ordinary clerical work of the type customarily performed by clerical forces (R. 36-37) and highlights the involvement of the Clerks.

The legislative history of Section 3 First (j) discloses that the Clerks are entitled to due notice. This is shown in the following colloquy between Commissioner Eastman, the principal author of the bill,[4] and Representative Kenney during the 1934 hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess. (at p. 51):

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4. See *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 723, note 16.

"Mr. Kenney. Mr. Eastman, a dispute of considerable importance might arise. Under this bill would all the labor unions, on any matter that might arise, have a right to be heard on the question?

"Commissioner Eastman. You mean before the Adjustment Board?

"Mr. Kenney. Yes. If a company union raised a question before the Board would the standard union also have the right to appear and be heard on the matter?

"Commissioner Eastman. There is a special provision on page 16, paragraph (j):

> "'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.'

"Mr. Kenney. They might not be directly involved, but the principle may affect them. Do you think this provision is broad enough to give the right to the standard union to appear in respect to that right before the Board on questions raised by the company union?

"Commissioner Eastman. Well, I think that that is intended to be quite broad. These questions that come before the Adjustment Board relate to minor matters, to grievances and to interpretations of existing rules, and so on, and it would be my view that that paragraph [Section 3 First (j)] gives the parties the opportunity to be heard in person, if they care to be heard, and by counsel, or by other representatives.

"Mr. Kenney. That is, from the various unions?

"Commissioner Eastman. Yes."

Since both unions and individuals are not given an opportunity to be heard unless the Board sends them formal notice (R. 25-26, 38), the Board was required to give formal notice to the Clerks and the incumbent so that they would have that opportunity to be heard which was contemplated by the language and legislative history of Section 3 First (j). As stated in *New York* v. *New York, N. H. & H.R. Co.*, 344 U. S. 293, 297, "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

It is interesting to observe that the Government refused to represent the Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N.D. Ill., 1953), affirmed, 212 F. 2d 32 (C.A.7, 1954), because the Board's failure to give due notice deprived the employees of "their position without regard to their constitutional rights" (R. 24). The Government informed this Division of the Board (R. 25):

> "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case."

Among the cases cited in the Government's letter to the Board was *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C.A.5, 1937), where the court construed the phrase "employees involved" in Section 3 First (j) as follows (at p. 770):

> "Apparently, the Board held that Lane was not involved in the dispute and therefore was not entitled to notice under the provisions of section 3. In this we think the Board was wrong. * * * But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

In *Townsend* v. *National Railroad Adjustment Board,* 117 F. Supp. 654 (N.D.Ill., 1954), the same phrase was defined as follows (at p. 658):

> "An employee is 'involved' in a dispute within the meaning of Section 3 [First (j)] of the Railroad Labor Act if he will or could be adversely affected by an adjudication of the dispute. Hunter vs. Atchison T. & S. F. Ry. Co., 7 Cir., 1951, 188 F. 2d 294. Indeed, if the term were not so defined, grave constitutional questions would be presented, for trainmen might be deprived of property—e.g., the right to do a particular kind of work —as the result of hearings in which they did not participate." (See also *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 734, note 31.)

The word "involved" in Section 3 First (j) was construed as follows in a recent award (Third Division Award 6482, at p. 25):

> "The word *involved,* which has been said to be ambiguous, is derived from the Latin 'involvere' meaning

to roll about or wrap up. One of the current definitions of the verb form is 'draw into a complication; implicate,' and another 'to roll up in itself so as to gather in, embrace or comprehend; include.'

"Thus we are of the opinion that as the word appears in Section 3, First (j) of the Act, it refers to employes who are implicated, or included in the matter under submission. It applies to persons substantially affected or to be affected by an order of this Board."

After giving due notice to the incumbent and his union, the Board could consider in one proceeding both the Telegraphers' and Clerks' contracts in the light of each other and in the light of custom, practice and usage under those contracts, in order to determine whether both contracts or only one of them apply to the Palestine, Illinois, work in question. It must be remembered that Section 3 First (i) of the Railway Labor Act gives the National Railroad Adjustment Board authority to interpret and apply bargaining agreements. Consequently, this is the very type of controversy which the National Railroad Adjustment Board was established to resolve. Thus the Board has held that it has jurisdiction to interpret and apply contracts between a carrier and two unions. For example, in Award 5432, the Third Division (which is the one herein) stated (at p. 25):

"Where the carrier has contracted with one or both parties to a dispute, no jurisdictional question is involved. It is then a matter of contract interpretation for this Board."

See to the same effect, Third Division Awards 4471, 4951 and 5410. These awards accord with the decisions in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks.*

188 F. 2d 302 (C.A.7, 1951); *Brennan* v. *Delaware, L. & W. R. Co.*, 303 N.Y. 411, 103 N. E. 2d 542 (1952), certiorari denied, 343 U. S. 977; and *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654, 659 (N.D.Ill., 1954); see *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 205. An Emergency Board has also observed that the National Railroad Adjustment Board was "designed to adjudicate such controversies." (See p. 13. of July 24, 1945, Report of Emergency Board appointed to investigate certain disputes between the Illinois Central Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Locomotive Engineers.)

One of the exhibits in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, shows too that the National Railroad Adjustment Board rather than the National Mediation Board has jurisdiction over such disputes concerning the interpretation and application of different labor contracts. Thus Exhibit P-12 (see *Pitney* R. 17-18), which is a telegram from the Secretary of the National Mediation Board to the President of the Order of Railway Conductors, declares:

> "After due consideration [National Mediation] Board finds you base your claims on provisions of existing agreement. Board has never considered Section 5 of Railway Labor Act [45 U.S.C. 155] as covering alleged violation of agreements or claims to service based on previously existing rights, such matters being covered by Section 3, First (i) of the Act [dealing with the National Railroad Adjustment Board]. The National Mediation Board therefore directs me to advise you it has no jurisdiction over the dispute in its present status."

Furthermore, the National Mediation Board does not agree that mediation is the proper solution of controversies such as this, because mediation is only between the union whose

strike threat has brought on mediation and the carrier, and would not include the union performing the work (p. 34 of the 17th Annual Report of the National Mediation Board for 1951).

This case is simply an attempt by the Telegraphers and Clerks to apply certain union contracts to specific work. It falls within the Board's statutory function concerning the "interpretation or application" of collective bargaining agreements (Section 3 First (i)) and that function is to be done as a whole, and not by halves as petitioners desire. Particularly is this true because each half would then be decided by a different referee. The Board is of course required to decide claims on the basis of all the facts and all the applicable contracts.

As stated in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 305-306 (C.A.7, 1951):

> "The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. However, we are convinced from our examination of the Act that it does not require such construction.
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> "Obviously it is desirable to settle controversies such as these involving so-called 'over-lapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by §6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought

> before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. And we think the case, Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, supports this view. That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.' "

This is not a case of deciding which union has the right to contract, as the amici imply (Br. 15). It is a case of interpreting two contracts to determine whether one or both cover the same work. Since the *Pitney*, *Slocum*, *Missouri-Kansas-Texas* and *Brennan* cases, as well as various Awards, have decided that the Board does have jurisdiction to interpret both contracts, it follows, as the amici curiae admit in such circumstances (Br. 15), that the incumbent and the Clerks are clearly "entitled to notice and an opportunity to be heard in opposition to the Telegraphers' claim."

Throughout their brief, petitioners erroneously assert that this lawsuit is an attempt of the carrier to have the Board rewrite existing contracts with the Telegraphers and Clerks. Nothing could be further from the truth. The Carrier Members merely seek to be able to interpret and apply the two contracts in the light of each other and of

custom, practice and usage. It is for the Board to decide which contract applies, or whether they overlap. In considering the Telegraphers' and Clerks' agreements in one proceeding, the Board could hold, if it is a fact, that the contracts overlap. The carrier would then have to seek such other remedy as might be available to it. Giving all persons an opportunity to participate in one proceeding would prevent the second dispute threatened by the Clerks (R. 28). As the Telegraphers' own representative has said at another time:

> "I am certain that Mr. Douglas, the referee, or any member of the Board, cannot and will not say that Congress, in enacting the Labor Act, intended to create another dispute through the National Railroad Adjustment Board in disposing of one and that is what Awards 3932, 3933, and 3934 actually accomplish. The referee gets entirely away from the facts when he states that the third party is 'indirectly' affected, when as a matter of fact, The Order of Railroad Telegraphers, as well as the carrier, is 'directly' affected, as it takes the work and the positions away from The Order of Railroad Telegraphers and gives them to the Brotherhood of Railway and Steamship Clerks without examining the facts in the case as to the contractual relations between the ORT and the carrier." (See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board* 26 Labor Cases ¶68,671 (N.D. Ill., 1954), p. 87,271.)

In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, the railroad's complaint (par. 30; *Slocum* R. 13) stated that it could not get the two claims of the Clerks and Telegraphers before the Board and have them settled so that both organizations would be bound. The Telegraphers' denial (*Slocum* R. 19) necessarily admitted that the Board does have binding power to interpret both contracts together, as requested by the instant respondents.

The Telegraphers stated in their *Slocum* brief that cases such as these do not involve the Board's consideration of generally phrased collective bargaining agreements alone, but also the custom, practice and usage thereunder (at pp. 7, 25, 27). That is why the Clerks and Telegraphers should be before the Board and a single referee in one proceeding to prove the custom, practice and usage claimed by each. The Telegraphers in the *Slocum* case also relied (Br. 25) on the same language from *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, as the court of appeals relied on in this case (R. 56). That said language was intentionally used by this Court is suggested by the fact that the petition for rehearing in the *Pitney* case specifically took issue with and argued against that language (at pp. 2-6). This Court denied the petition.

As in *Missouri-Kansas-Texas R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954), if the respective claims of the Telegraphers and Clerks are to be presented to the Board in different proceedings, this simply means that one referee will decide the Telegraphers' claim and another referee the Clerks' claim and at no time will a single referee have the benefit of the position of the incumbent, the Telegraphers, Clerks and carrier.

It is elementary that notice and hearing are necessary attributes of due process. *In re Oliver*, 333 U. S. 257, 273; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 187; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124. This complaint was filed so that the proceeding before the Board will comply with rudimentary notions of due process. Unless the Board gives notice to Shears and the Clerks, their constitutional and statutory rights will be violated.

The petitioners have urged this Court to pass on the due notice issue (Pet. 14). When this Court holds that due notice must be given to the incumbent and his union, then and only then will the Board comply with the notice provisions of Section 3 First (j). Unless the decision below is affirmed, in this type of case the Board will still refuse to accord hearings to individual employees or their union even though their status might be affected by the Board, and even though the Carrier Members vote to give notice. See *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 205; *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 798, note 15 (C. A. 3, 1951); "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303, 314 (1951).

The court below was unable to understand why the Board failed to give notice, stating (R. 55-56):

> "It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute."

The Telegraphers themselves sought to participate in the Clerks' claims involved in the *Missouri-Kansas-Texas* case.[5] In their petition for certiorari (at pp. 3-4, 7-8) in this Court in *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 329 U. S. 758, they also claimed that the Railway Labor Act required that they and the incumbents be given due notice and an opportunity to participate. Therefore, it seems ironic for them now to assert that the

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5. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), finding 66, p. 87,262; see also Third Division Award 2597.

Clerks are not entitled to notice and to participate in this Telegraphers' case. The change in position is because a *rapprochement* has taken place between the two unions, so that each may obtain a favorable award against a carrier without notice being given to the other. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954), findings 59-64, pp. 87,261-87,262, finding 158, p. 87,276; see also p. 87,285. (None of the findings in the *Missouri-Kansas-Texas* case was challenged by the petitioners, who were also parties therein.) In that way, a carrier is faced with two conflicting awards, each made by a different referee without benefit of the arguments made in the other claim, and each of which is "entitled to presumptive weight" by the courts (*Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 664).

For years the Telegraphers persisted in contending that the Board must give them and incumbents notice and an opportunity to be heard when another union was claiming work being performed by Telegraphers. But in 1942, H. C. Kearby, a vice president of the Telegraphers and a member of the Board, voted against the Clerks' claims in a series of six awards. As a result the Clerks and Railway Labor Executives' Association had Mr. Kearby removed from the Board. (After his removal, the Clerks filed similar claims and a referee decided them in their favor.) The Telegraphers thereafter acceded to the Clerks' and Railway Labor Executives' Association's policy on notice in order to secure Board representation again, which was finally accomplished in 1949. See *Missouri- Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N.D. Ill., 1954), findings 60-64, pp. 87,261-87,262; Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis," 5 Industrial and Labor Relations Review 365, 381 (1952).

In an effort to avoid the notice requirement of Section 3 First (j), petitioners urge that an incumbent might be entitled to notice if he does not have a contract with the carrier, on the alleged ground that an Adjustment Board proceeding and a statutory judicial enforcement suit "are not available in such a situation" (Br. 32). This completely ignores the fact that the Board also has jurisdiction over grievances, and not just over the interpretation and application of contracts. Likewise, enforcement suits are available with respect to awards settling grievances. (See Sections 3 First (i) and (p) of the Railway Labor Act.)

Of course, where the third-party incumbent has a contract, he is "involved" within the meaning of Section 3 First (j), for if the claimant prevails and obtains an award sustaining his interpretation of his contract, the incumbent loses his job.

If the Clerks did not have a contract with the carrier, surely the petitioners would still argue that the Clerks were not entitled to notice, on the ground that there was no contract between them and the railroad. Thus in *Hunter v. Atchison, T. & Santa Fe Ry. Co.*, 171 F. 2d 594 (C.A. 7, 1948), certiorari denied, 337 U. S. 916, the brakemen unsuccessfully argued (at p. 597) that the porters were not entitled to notice under Section 3 First (j) because they had no contract with the railroad.

The petitioners allege that the Board has no way of knowing whether the sustaining of the Telegraphers' claims would result in displacement of the incumbent (Br. 35-36). However, the Board does not sit in an ivory tower. Its experience with past awards teaches that whenever claimants obtain sustaining awards, the work in question is normally transferred to members of the claiming union, and the incumbent members of the rival union are dis-

placed. See, for example, *Missouri-Kansas-Texas Railroad* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 304 (C.A. 7, 1951). If the award in the instant case should decide the claim in favor of the Telegraphers, it is anticipated that the incumbent and the Clerks would lose out, for the Telegraphers would exert persuasion and economic power to cause compliance with the award. It is plain that carriers will not simultaneously employ two persons where one had been employed satisfactorily. The Telegraphers certainly know that, for the survey which they make before filing a claim would show the nature of the work, who is doing it, and how much of his time is devoted to it.

The petitioners argue that the incumbent is not injured but instead only persons at the bottom of the seniority roster are likely to be damaged (Br. 36). That argument does not recognize that an incumbent would normally be satisfied with his present job and not be desirous of dropping down one step. Such a demotion would obviously render him an aggrieved or "involved" person. Furthermore, courts are familiar with the problems which arise in drawing a line between those whose interest is sufficiently direct to be given judicial recognition and those who must rely on others to enforce their interests. Thus it has been held that the present incumbent is the one who is entitled to notice rather than those of less seniority than he. *Brotherhood of Railway and Steamship Clerks* v. *Pennsylvania R. Co.*, 107 F. Supp. 924 (W.D. Pa., 1952); cf. *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 800 (C. A. 3, 1951).

Petitioners also state that lack of notice to the incumbent was never raised before the Board (Br. 36-37). However, the record shows that a Carrier Member raised the lack of

notice "to the employes involved," whom he defined as "The Brotherhood of Railway Clerks, or the constituents thereof" (R. 18), thereby, of course, including member Shears, and there is an unchallenged finding that the Carrier Member objected "upon ascertaining that no notice had been given to the Clerks or to members of the craft represented by the Clerks" (R. 37).

With respect to notice to an incumbent, the petitioners claim that the Board will not be able to ascertain his name (Br. 36). But the carrier can of course easily supply the incumbent's name, and the claimant union would also have this information from its survey preparatory to filing its submission, so that this asserted difficulty is actually nonexistent.

This case involves contracts of the Telegraphers and Clerks, and the Third Division has jurisdiction under Section 3 First (h) over "telegraph employees" and "clerical employees." Consequently, there is no question here of giving notice to employees subject to another Division (cf. petitioners' Br. 33-34), and such cases seldom arise. In any event, the jurisdiction of the various Divisions of the Board is now grounded "on a craft or job classification irrespective of the labor organization representing the particular employees involved" (*Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 528). Therefore, if a Division has jurisdiction over the claimant craft or job classification, it should give notice to third persons (see Third Division Award 1400), and the ensuing hearing will enable the Division to determine what relief should be accorded. It is immaterial that one of the unions may not have a member on the Division, for the number of Labor Members on the entire Board was fixed "without any thought that it would give all the different organizations a representative" (Hearings on H.R. 7650 before the House Committee on

Interstate and Foreign Commerce, 73d Cong. 2d Sess., p. 93).

Under Section 3 First (m) of the Railway Labor Act, awards are to be "final and binding." Since the Act contemplates valid awards settling the matters in issue, the Board should not be permitted to render a void award, which will simply engender further controversy, including threats and strikes (see *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶68,671 (N.D. Ill. 1954), finding 127, at p. 87,272). This action was filed so that the Board will proceed to render a valid award, as contemplated by Congress. The Board should not be permitted to continue flying in the teeth of its known duty, resulting in deserved criticism and disrespect. See "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303 (1951). It is in the public interest to avoid periods of potential conflict when a carrier, employee, and his union may not know what the employee's status is. Therefore, the Board should adjudicate Shears' status at the same time that it is considering the Telegraphers' claim to his work. But unless the Board gives Shears and the Clerks notice and an opportunity to participate, it will, as always, refuse to consider together the Telegraphers' and Clerks' contracts as intended by the *Pitney* and other decisions.

The brief of the amici curiae insists that if the decision below is affirmed, the National Railroad Adjustment Board will be by-passed (Br. 21; see also petitioners' Br. 35). The short answer to this rather hysterical claim is that claims are being regularly docketed and processed by the Board. Of the cases before the Board, only a small percentage involve the issue of due notice to third persons. Since there are few cases of this nature, the statement of the amici curiae that this Board would not be utilized if the decision below is affirmed is highly exaggerated and without any foundation in fact.

II. FORMAL NOTICE IS NECESSARY BECAUSE ACTUAL NOTICE TO THE IMCUMBENT AND HIS UNION WOULD NOT ENTITLE THEM TO PARTICIPATE IN THE PROCEEDINGS BEFORE THE BOARD.

Petitioners contend (Br. 38-41) that if the incumbent and his union had actual notice, that would suffice. In the first place, it is not shown that the incumbent had actual notice (R. 37). Moreover, the facts in this record, as well as in many other cases, have established that the Board will permit only those who have received formal notice to participate in proceedings before it (R. 25-26, 38). Consequently, actual knowledge of the proceedings would not suffice, for due process requires not only notice but an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123, 124; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 178; *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 297.

In order that the employees involved would be permitted to participate before the Board, the actual notice test was found insufficient in this case (R. 55) and in *Allain* v. *Tummon*, 212 F. 2d 32 (C.A. 7, 1954), and formal notice was required because of the actual practice of the Board. The court explained the reason for this change in the *Allain* case (212 F. 2d at pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second Hunter case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We

> hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for a sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity, and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him.'
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> "Although we indicated in that opinion that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."[6]

As shown, actual notice of the proceedings would not permit the incumbent and his union to participate in the hearing of this docket. Yet Section 3 First (j) of the Railway Labor Act requires the Board to give "due notice of hearings," obviously so that the employees involved might be allowed to participate in those hearings.

Elgin, J. & E. R. Co. v. *Burley*, 325 U. S. 711, contemplates that an affected employee must be permitted to participate in the proceedings before the Board, for the Court said (at p. 736):

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6. See also *Townsend* v. *National Railroad Adjustment Board*, 117 F. Supp. 654, 657 (N.D. Ill., 1954); *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453, 459, 460 (N. D. Ill., 1953), affirmed, 212 F. 2d 32 (C. A. 7, 1954).

> "His [the employee's] *rights*, to share in the negotiations, *to be heard before the Board*, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier could foreclose his claim altogether at the threshold of the statutory procedure." (Italics supplied.)

The Court further noted that when a dispute has been submitted to the Board, the affected employee "has *rights of* notice, *hearing* and individual representation according to his choice" (at p. 746; italics supplied). This opinion was subsequently adhered to in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 662, 666.

To support their argument that actual notice is sufficient, petitioners cite (Br. 38) *Estes* v. *Union Terminal*, 89 F. 2d 768 (C. A. 5, 1937); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294 (C. A. 7, 1951), certiorari denied, 342 U. S. 819; and *Kirby* v. *Pennsylvania R. Co.* 188 F. 2d 793 (C. A. 3, 1951). Those cases were decided before it was established that the Board will only hear persons who have received formal notice from it (R. 25-26, 38). But even in those cases the courts recognized that actual knowledge would not suffice unless the employees involved were given an opportunity to be heard before the Board. Thus in the *Estes* case, after showing that employee Lane had actual knowledge, the court stated (89 F. 2d at pp. 770, 771):

> "No man should be deprived of his means of livelihood *without a fair opportunity to defend himself*. Plainly that is the intent of the [Railway Labor] law.
>
> • • • • •
>
> "He had the *right* to intervene in the proceedings before the Board." (Emphasis supplied.)

Even in the *Hunter* case (which has been superseded as to

actual knowledge by this case and the *Allain* case; see *supra*, p. 33) the court said (188 F. 2d at p. 301):

> "*Actual notice* of the hearings for a sufficient period prior thereto *to permit plaintiffs* to be present and *to be heard* is all that is required.
>
> • • • • •
>
> "The statute requires the Adjustment Board to give due notice of all *hearings* to the employees involved in the dispute before it, and not merely notice of the fact that proceedings may be pending before the Board." (Emphasis supplied.)

Finally, in the *Kirby* case, the court stated (188 F. 2d at p. 798) that employees involved "are entitled to notice and an *opportunity to be heard before the Adjustment Board.*" (Italics supplied.)

Unless the incumbent and the Clerks are given formal notice and an opportunity to be heard, they would not be bound by an award herein. Actual knowledge would not bind them, for persons with actual knowledge would not be permitted to participate before the Board (cf. petitioners' Brief 8). In *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 297, the City of New York had actual knowledge but was not held to be bound thereby.

In order to enforce the Railway Labor Act, the instant injunction stays the proceedings of the Board until (1) it gives "formal notice" to the employees involved and (2) permits them "to participate in the proceedings" before the Board (R. 41). The injunction was two-pronged because due process requires not only notice but also an opportunity to be heard.

III. JUDICIAL RELIEF IS NECESSARY.

Petitioners have argued at length that it was improper for the district court to grant any relief (Br. 9-27). How-

ever, the circumstances of this case certainly necessitate relief in the nature of mandamus. The Carrier Members of the Board welcome the assistance of the Court so that the Board will perform its statutory duty to give notice.

A. The Preliminary Injunction Was Warranted Because the Board Had Already Determined Not to Give the Statutory Notice.

The Board was requested to give the notice required by the Railway Labor Act, but by a 5-5 vote it denied the request (R. 20, 46). The Board had already made the wrong decision. Cf. *Pope* v. *United States*, 323 U. S. 1, 14, and *Burnet* v. *Desmornes y Alvarez*, 226 U. S. 145, 147, on which petitioners rely (Br. 21). Even if the referee had subsequently voted that notice be given, no notice would have issued, for the practice of the Board is not to give notice unless the Board is unanimous (Appendix, *infra*, p. 68).

Since the Board had already refused to perform its statutory duty (R. 46, 20), it became appropriate for the district court to accord the relief which the Board would not give. Cf. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124; *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165, 167 (S. D. N. Y., 1924). The district court was merely endeavoring to enforce the command of Section 3 First (j) in the face of the Board's refusal to act. The Board has already been given "the first opportunity to pass on the issue" (*Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567) and has denied relief, so that there was no reason for the district court to stay its hand. Equitable relief is needed, for "the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * *' created to protect the interest of individuals or the public is clearly shown" (*ibid.* at p. 566).

Here then there was an exhaustion of the administrative remedy on notice, so that judicial intervention was warranted. Cf. *Gibson* v. *United States*, 329 U. S. 338, 350; *Lovell* v. *Griffin*, 303 U. S. 444, 452-453. But in any event, it was unnecessary for the carrier to proceed further before the Board, for the failure to give notice made the Board powerless to proceed (R. 53). Cf. *Montana Bank* v. *Yellowstone County*, 276 U. S. 499, 505. As held in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 799 (C. A. 3, 1951):

> "The Board's authority to act is based upon the statute. Until the statutory requirements are met, it has no more standing to produce legally effective orders than any voluntary group of citizens."

See also *Allain* v. *Tummon*, 212 F. 2d. 32, 36 (C. A. 7, 1954).

The rule as to exhausting administrative remedies is not an absolute but is rather a rule of judicial administration. *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 282; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 156-157; *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 468. As stated in McAllister, "Review of Federal Administrative Orders," 28 Cal. L. Rev. 129, 164 (1940):

> "The substance of the inquiry that should be made is whether the administrative action in question, no matter what form it may take or at what stage of some proceeding it is taken, is important and final enough so that some door should be open to subject it to judicial examination."

Here the Board's decision not to give notice was sufficiently "important and final" to warrant rectification by the courts.

Thus in *Waite* v. *Macy*, 246 U. S. 606, the federal Tea Board had not yet decided the case against the plaintiff tea

importers, but the Court granted them relief. Mr. Justice Holmes stated (at pp. 608-609):

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill* v. *Jones*, 106 U. S. 466. *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215. *United States* v. *George*, 228 U. S. 14, 21. Again, it is true that courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain."

Similarly here, it is already known that the Board will not give due notice (see p. 37, *supra*), so that the district court was justified in granting the preliminary injunction. "The Secretary and the board must keep within the statute * * * which goes to their jurisdiction * * *" (246 U. S. at p. 610).

As shown, the Board has already decided not to issue the notice specified in Section 3 First (j) of the Railway Labor Act and the respondents are unable to compel the Board to perform its statutory duty without the aid of a court. The Board proposes to adjudicate the claim without complying

with the statutory notice and hearing requirements (R. 37). In these circumstances, petitioners' "objection to judicial restraint of an unauthorized exercise of powers is not weighty." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 157.

B. Since the Board Has Exceeded Its Statutory Authority, the Rule Requiring Exhaustion of Administrative Remedies Is Inapplicable.

In Part III A, *supra*, the respondents have shown that the Board has already ruled adversely on the notice question, and that no further administrative relief is available to secure notice. Even if administrative remedies were available, the rule requiring exhaustion of administrative remedies is inapplicable, since the Board has exceeded its statutory authority.[7]

The respondent Carrier Members of course recognize the rule that ordinarily judicial intervention is not warranted where plaintiffs have not exhausted their administrative remedies. However, that rule does not apply where, as here, the administrative body has failed to comply with the governing statute and has, therefore, acted without statutory authority.[8] Stated differently, the rule does not apply

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7. The authorities are collected in Judge Frank's dissent in *Lichten* v. *Eastern Airlines*, 189 F. 2d 939, 945-948 (C. A. 2, 1951). The majority opinion in the *Lichten* case also acknowledged that the exhaustion rule does not apply where an administrative agency transcends its powers (at p. 941).

8. *Work* v. *Louisiana*, 269 U. S. 250, 254; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187-188; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562-563; *Waite* v. *Macy*, 246 U. S. 606, 610; *Dragna* v. *Landon*, 209 F. 2d 26, 28 (C. A. 9, 1953); *Chambers* v. *Robertson*, 183 F. 2d 144, 146 (C. A. D. C., 1950), reversed on other grounds, 341 U. S. 37; *United States* ex rel. *De Lucia* v. *O'Donovan*, 178 F. 2d 876, 879-880 (C. A. 7, 1950), certiorari denied, 340 U. S. 886; *Wettre* v. *Hague*, 168 F. 2d 825, 826-827 (C. A. 1, 1948); cf. *U. S. Alkali Export Ass'n* v. *United States*, 325 U. S. 196, 204.

where the defect urged goes to the jurisdiction of the administrative agency[9]

Thus in *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, an administrative agency was compelled to act in compliance with the basic statute, even though the administrative action was still in an initial stage where, as here, the administrative departure from the statute was clear.

In the *Kansas City Southern* case, the pertinent statute required the Interstate Commerce Commission to ascertain the value of railroad property in a prescribed way. In the midst of its hearing, the Commission refused to receive testimony proffered by the railway under that statute, and the railway thereupon brought a mandamus proceeding.

In upholding judicial intervention, the Court noted that the controversy was "one solely involving an alleged refusal to discharge duties which the statute exacts" (252 U. S. at p. 187). Similarly here, the Board has refused to discharge its statutory duty of giving due notice of the hearings to D. A. Shears and his union.

In ordering the Commission to perform its statutory duty, the Court stated (252 U. S. at p. 187):

> "Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready

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9. *Waite* v. *Macy*, 246 U. S. 606, 608, 610; *Gonzales* v. *Williams*, 192 U. S. 1, 15; *Ogden City* v. *Armstrong*, 168 U. S. 224, 239; *Varney* v. *Warehime*, 147 F. 2d 238, 243 (C. A. 6, 1945), certiorari denied, 325 U. S. 882; cf. *De Beers Consolidated Mines* v. *United States*, 325 U. S. 212; *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456; *Brown Lumber Co.* v. *Louisville & Nashville R. Co.*, 299 U. S. 393, 398-399; *Reynolds* v. *United States*, 292 U. S. 443, 446; *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 147-148 (C. A. 5, 1936), certiorari denied, 298 U. S. 688.

> solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command."

The Court concluded by stating that the Commission had "no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise" (at p. 188). Here the Board is exerting its general power under the Railway Labor Act while disregarding the essential due notice conditions imposed by Congress in Section 3 First (j) of the Act. Accordingly, as in the *Kansas City Southern* case, the Board should be directed to perform its statutory duty, *viz.*, to give due notice of all hearings to D. A. Shears and the Clerks in compliance with Section 3 First (j) of the Act.

In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, the defendants contended that the district court did not have jurisdiction to grant relief from an I.C.C. rate increase because the plaintiff had not exhausted its remedies before the Commission. In holding that the district court properly assumed jurisdiction, Mr. Justice Brandeis stated (at pp. 562-563):

> "But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49;

Louisiana & Pacific Ry Co. v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. *The Sacramento Case, supra*, was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433. The district court properly assumed jurisdiction of this suit."

The rule requiring exhaustion of administrative remedies would seem especially inapplicable where, as here, the administrative agency has not only ignored the statutory command but has ignored constitutional rights to notice and hearing. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 160-165, 178; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C.A. D.C., 1953), certiorari denied, 347 U. S. 943. No question requiring administrative expertness is involved, but a decision by this Court is required to establish uniformity in the Board as to notice. Cf. *Lichten* v. *Eastern Airlines*, 189 F. 2d 939, 946 (C.A.2, 1951) (dissent). At present, there is a hopeless morass of conflicting awards on the due notice issue. For example, the following awards observe the provisions of Section 3 First (j) and favor the giving of notice to involved persons other than the claimant and carrier: Third Division Awards 1193, 1400, 3368, 5432, 5599, 5627, 5751, 5759, 6051, 6227, 6390 and 6683. However, the following awards are contra: Third Division Awards 844, 902, 1137, 1309, 2253, 2548, 3932, 5702, 5865, 5993, 6115 and 6203.

Since there was a lack of unanimity in the Board, notice issued in none of the above cases (see Appendix, *infra* p. 68).

The failure to give notice was not the basis for Award 6224 (cf. petitioners' Br. 14).

Two of the awards relied upon in the brief of the amici curiae (Br. 11-12) do not even concern the question of notice under Section 3 First (j); the remaining award (Br. 10-11) is believed to be erroneous.

Since notice never is issued unless the Board is unanimous (see Appendix, *infra*, p. 68), claims are held in abeyance or dismissed without prejudice when awards decide that due notice should be given. The claims dismissed without prejudice are then re-filed[10] in the hope that the notice issue will be decided differently. Thus this stalemate on notice has increased the number of unresolved claims and is the kind of "jurisdictional frustration on an administrative level" (*Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 524) appropriate for resolution by the courts. The Carrier Members insist that the Board needs judicial guidance to end the unceasing conflict in the Board on notice and permit cases involving that issue to be decided properly.

Unlike the cases relied on by petitioners (Br. 10-13), the carrier in this case is not trying to by-pass the Board but instead is trying to have the Board issue notice so that it may render a valid award. In view of the Board's flagrant disregard of the notice requirements of Section 3 First (j), "this Court should no longer require exhaustion of * * * ineffective and inadequate remedies before permitting resort to the federal district courts * * *." *Marino* v. *Ragen*, 332 U. S. 561, 570 (concurring opinion); cf. *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 468-469.

The cases on which petitioners rely (Br. 10-13) are not in

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10. See, *e.g.*, *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302, 304 (C. A. 7, 1951).

point, for the plaintiffs in those cases were seeking to avoid administrative hearings, while here the carrier wants the Board to decide this claim after notice is given. Perhaps petitioners' main reliance is on *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, but there the company attempted to short-cut and by-pass the review procedure outlined in the Act for renegotiation of war contracts. The company there did not want to deal with the Tax Court. Here the carrier is not only not trying to avoid going to the Board but also is actually trying to have its case decided validly by the Board. The whole point of this action is to put the case properly before the Board, not to take it away from the Board. Furthermore, the Tax Court's actions in the *Aircraft & Diesel* case were blameless. Here the trouble arises because the Board is deliberately ignoring its known duty; it has chosen to contradict the statute and all the decisions interpreting it. In this case, it has already refused to give notice (see p. 37, *supra*). The letter from the Department of Justice to the Board refusing to represent the Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N.D.Ill. 1953), affirmed, 212 F. 2d 32 (C.A. 7, 1954), reveals the extent to which the Board has disobeyed the notice requirement of Section 3 First (j) (R. 23-25). Even the *Aircraft & Diesel* case acknowledges that the exhaustion rule is not inflexible (331 U. S. at p. 773).

In the *Aircraft & Diesel* case, the Court quoted (331 U. S. at p. 774) the following excerpt from *Yakus* v. *United States*, 321 U. S. 414, 435:

> "Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed."

Here the Board has already refused to give due notice and, therefore, has shown that it is incapable of affording due process. The Board has continued to reject all the decisions requiring it to give due notice in the circumstances here presented.

Petitioners also rely (Br. 13, 15) on *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, but there the Court stated (at pp. 540-541):

> "It is appellee's principal claim that there is no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no right to do so. We, therefore, go directly to the heart of this controversy, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized."

In the instant case also, it is respondents' claim that there is no properly authorized administrative procedure and that the Board has no right to determine the claim—until due notice is given. Therefore, as in the *Grand Central Aircraft* case, it is appropriate to "go directly to the heart of this controversy, which is the question whether" notice must be given to the incumbent and his union pursuant to Section 3 First (j) of the Act. The respondents did not ask the courts below, nor are they asking this Court to decide the claim pending before the Board. The due notice question is the only one presented for adjudication. The question of interpreting the notice requirements of Section 3 First (j) does not require any expert administrative experience, but instead is the kind of question typically decided by courts.

The exhaustion cases on which the petitioners rely do not involve notice and are cases in which the administrative agencies were just embarking. In the instant case, years of experience of abuses under Section 3 First (j) have taught the respondents that they have no chance of

persuading the Board to give due notice. Patience and remedies have been exhausted over the years. Thus, although the Eighth Circuit first held in the *New Orleans, Texas & Mexico Railway* case that it would not grant the relief sought, the passage of time convinced the court that the Board would not reform if left to its own devices and, accordingly, the *Templeton* case overruled the *New Orleans, Texas & Mexico Railway* case (see p. 14, *supra*).

The petitioners have attempted to challenge a dictum of the court below that the Railway Labor Act does not give a referee authority to decide the question of notice (Br. 21-24). However, petitioners have no standing to argue this point, for it is not contained in the questions presented in the petition for certiorari (Pet. 2-4). *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179. Nor is the point discussed in Judge Swaim's dissent (R. 57-60).

It is unnecessary for this Court to determine whether or not a referee may pass on the due notice question because this Court's interpretation of Section 3 First (j) will constitute an authoritative precedent for the future guidance of the Board and will prevent deadlocks on the question of due notice. Even if the referee herein had voted in favor of due notice, the Board would not have issued due notice because of the lack of unanimity on the question (see Appendix, *infra*, p. 68) .

This referee was appointed to decide the Board's deadlock on the merits (R. 46) and "there is no provision for the appointment of referees to resolve procedural deadlocks" (see "Railroad Labor Disputes and the National Railroad Adjustment Board," 18 Univ. of Chicago L. Rev. 303, 311, note 57 (1951); Northrup and Kahn, "Railroad Grievance Machinery: a Critical Analysis," 5 Industrial and Labor Relations Rev. 365, 368, 372 (1952); *Kirby* v.

Pennsylvania R. Co., 188 F. 2d 793, 798, note 15 (C.A.3, 1951)). In *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, it was assumed that a referee's power extends only to breaking deadlocks on the merits. It might be noted that the Mediation Board's almost invariable practice has been, as here, to appoint referees to resolve deadlocks on the merits rather than to resolve deadlocks on due notice. Indeed, that was true of all the Awards on which petitioners rely (Br. 22).

Regardless of whether certain referees have passed on the question of due notice, this record establishes that it is the present practice of the Third Division "to consider matters of procedure in executive session at which only the regular 10 members and the Secretary of this Division are permitted to be present and at which only the regular 10 members are permitted to vote" (R. 26; see also R. 20). Moreover, the district court found that "In accordance with the custom and practice of the Third Division, Referee McMahon was excluded from the consideration and vote on the [due notice] objection" (R. 37), and this finding was not challenged by petitioners.

The record thus establishes that the entire Third Division did not consider that the referee had power to decide the due notice question, so that, as far as the Board is concerned, his authority is not really an issue in the case (R. 20).

It is incorrect to assert, as petitioners do (Br. 23), that when referees have passed on the due notice question, disputes have been successfully resolved. Instead, the truth of the matter is that where the referees have favored notice, claims are held in abeyance or dismissed without prejudice, instead of being decided on the merits. Where referees have decided that it was unnecessary to give notice, the disputes have not been resolved either, for the ensuing void awards have bred litigation. For example, in *Missouri-*

Kansas-Texas Railroad Co. v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), the Board's failure to give notice has already resulted in 11 years' delay in obtaining settlement of the disputes there involved, caused by the Labor Members' and collective bargaining representatives' refusal to comply with Section 3 First (j) of the Railway Labor Act. For the same reasons, similar controversies on the New Orleans, Texas & Mexico and Santa Fe railroads have remained unsettled since 1937 and 1939, respectively. See *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 26 Labor Cases ¶ 68,622 (E.D. Mo., 1954); *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 188 F. 2d 294, 296 (C.A. 7, 1951), certiorari denied, 342 U. S. 819; *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527, 530 (C.A. 8, 1950), certiorari denied, 340 U. S. 823; *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56 (C.A. 7, 1954).

The petitioners claim that subsequent to the decision below the National Mediation Board has not been appointing referees where the Board is deadlocked on due notice and that accordingly there is an administrative paralysis (Br. 23). Actually, however, to avoid all possible administrative paralysis, claims are being dismissed for want of notice when that question is presented. See Third Division Awards 6482, 6483, 6484, 6485, 6680, 6681, 6682, 6683, 6799, 6812, and 6813. The Carrier Members of the Board know of no case being held up on the Board's calendar as a result of the opinion below.

C. An Enforcement Suit under Section 3 First (p) of the Railway Labor Act Is Neither an Exclusive nor Adequate Remedy.

Although petitioners claim (Br. 16-21) that when the Board fails to give due notice the only remedy available to the carrier is to defend an enforcement suit if one is filed

within two years after an award is issued (Section 3 First (p)), neither decision relied upon (Br. 19-20) so holds.

In *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (C.A.D.C., 1941), affirmed by an equally divided Court, 319 U. S. 732, it was held that a carrier may not have an adverse award of the Board reviewed on the merits, at least until after the expiration of the two-year period contained in the enforcement suit provision (Section 3 First (q)) (see 124 F. 2d at pp. 238, 251). Justice Rutledge expressly limited the *Washington Terminal* decision to the facts and issues there presented (124 F. 2d at p. 252). The plaintiff there attempted to have the court substitute its judgment for that of the Board. There is no such attempt here.

Similarly, in *New Orleans Public Belt Railroad Commission* v. *Ward*, 182 F. 2d 654 (C.A. 5, 1950), the Board had rendered an award against a carrier, which thereupon sought a judicial review on the merits. Neither that case nor the *Washington Terminal* case involved due notice, and here the carrier has not asked for judicial review of an award.

Unlike the *Washington Terminal Co.* and *New Orleans Public Belt Railroad Commission* cases, which hold that a court should not adjudicate the merits of a National Railroad Adjustment Board case, this complaint was filed so that the Board will give the requisite notice and then proceed to render an award on the merits. The injunctive relief sought in this case is to enforce the Railway Labor Act rather than to oppose it. Arguments as to the exclusiveness of the enforcement suit remedy have been rejected in all cases involving the failure to give notice under Section 3 First (j). See, *e.g.*, *Allain* v. *Tummon*, 212 F. 2d 32, 35 (C.A. 7, 1954) and cases cited; *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823.

The whole point of this lawsuit is to secure the serving of notice. Defending an enforcement suit would not result in the serving of notice. In an enforcement suit, the failure to give due notice would merely result in the voiding of the award, and the basic controversy would remain undetermined after a great expenditure of time, money and effort. It would still be necessary to file another action like the present one in order for due notice to be given. If the carrier should thereafter lose on the merits before the Board, damages would be claimed throughout the extra period of delay caused by the initial failure to give notice.

In addition, if the Telegraphers should file an enforcement suit, the incumbent and Clerks would not be parties,[11] so that there would be no presentation by the various involved persons of all the facts relating to the dispute, including custom, practice and usage, and the court would be unable to make a binding construction as to which collective bargaining agreement is applicable, or whether both are applicable. Cf. *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561, 567; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 305-306 (C.A. 7, 1951).

Petitioners have been unable to cite a single case supporting their theory that a district court has no jurisdiction to require the Board to give the due notice specified in Section 3 First (j). In contrast, on numerous occasions, this Court has held that the district courts do have jurisdiction to enforce the commands of the Railway Labor Act. See, *e.g., Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federa-*

11. See *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶68,671 (N. D. Ill., 1954); findings 165, 169, p. 87,277. Conversely, if the Clerks should sue to enforce a sustaining award, the incumbent and Telegraphers would not be parties.

tion, 300 U. S. 515; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 207; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Graham* v. *Brotherhood*, 338 U. S. 232. Those decisions fully support the district court's jurisdiction here.

Petitioners make the tenuous claim that this case does not involve a case or controversy within Article III, Section 2, Clause 1 of the Constitution (Br. 15-16). However, as in *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, the respondents are not seeking an advisory opinion. The Board has already refused to give the requisite notice and, as in many other cases in which the courts have granted relief, the respondents are asking the courts to enforce one of the statutory commands of the Railway Labor Act. As explained in *In re Summers*, 325 U. S. 561, 566-567, a case exists within the constitutional sense when any question respecting the Constitution or laws of the United States is in a form on which the judicial power may act, where plaintiffs are seeking a declaration "on rights as they stand," and where there is an actual controversy over an issue. Those tests are satisfied here, for the courts are capable of requiring the Board to give the due notice that it has thus far denied, the respondents are seeking a declaration on rights as they stand, and there is an actual controversy over the issue whether the Board must give due notice to the incumbent and his union under Section 3 First (j) of the Railway Labor Act. As the petitioners themselves conceded in their brief in the court of appeals (at pp. 20-21):

> "where Congress enacted a positive command in the Railway Labor Act, it must have intended that there be some remedy to rectify violations of the command and therefore intended a *pro tanto* modification of pre-existing law denying jurisdiction of the only relief that could afford a remedy."

That is the very principle which applies to this case.

If administrative agencies are permitted to hold proceedings without observing the basic notice and hearing requirements set forth in the governing statutes enacted in conformity with the due process clause, it will be a shocking and backward step in the field of administrative law. To insure proper respect and a willingness to comply with their authority, administrative agencies should be required to live up to the fair standards which Congress has delineated for them.

D. No Other Adequate Relief Is Available.

It is asserted (Br. 14, 26) that this claim might still be decided in the carrier's favor on the merits. But such an award would be a mere scrap of paper, utterly worthless for lack of notice to the incumbent and his union. It would serve as no protection to the carrier.

Even if a "denial award" should issue in the carrier's favor, the member of the Telegraphers who is seeking to obtain the work being performed by the incumbent Shears could then file a claim before the Board, perhaps first obtaining a judgment that the denial award is void for want of notice. Cf. *Elgin, J. & E. R .Co.* v. *Burley,* 325 U. S. 711, 738, where the Court stated:

> "• • • an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by § 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest."

In *Kirby* v. *Pennsylvania R. Co.,* 188 F. 2d 793, 798 (C.A. 3, 1951), the court said:

> "The notice problem has arisen before the Supreme Court as part of the question of whether an award of the Board in favor of the carrier was a bar to court action regarding the same dispute by an individual employee. The Court held that it was no bar unless notice and opportunity to be heard before the Board had been accorded the employee, or unless he had authorized the union to represent him. Elgin, Joliet & Eastern R. Co. v. Burley, supra."

If the Telegraphers' claim were denied on the merits, they too would feel free to file an identical claim again, for the award against them would be void for failure to comply with Section 3 First (j). Past experience teaches that such identical claims would be filed. Cf. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 188 F. 2d 302, 304 (C.A. 7, 1951).

A void denial award simply would not protect a carrier from subsequent litigation and administrative proceedings. If the Board is permitted to render a void denial award, this claim will not be settled for years although the Railway Labor Act was adopted for "the prompt and orderly" settlement of disputes (Section 2(5)). Moreover, as in many other cases where union claims have been denied, strike threats might well be exerted against the carrier. Cf. pp. 5, 24-25 and 32 of the 16th, p. 5 of the 17th and 18th, and pp. 5, 21, and 23 of the 19th Annual Reports of the National Mediation Board for 1950, 1951, 1952 and 1953; *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board,* 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954) finding 127, at p. 87,272. It is therefore idle fancy to contend (Br. 14, 26) that a denial award would afford the carrier adequate relief. Instead, a mandatory injunction requiring the Board to give due notice is the only means of assuring a valid award settling this claim by the Telegraphers to work being performed by a member of the Clerks.

As recognized in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793, 798-799 (C.A. 3, 1951), the carrier is entitled to the rendition of a valid award. The Act envisages "final and binding" awards (Section 3 First (m)). In order that the Board can proceed to render a valid award, the complaint prays that the Board be directed to serve due notice (R. 32). The petitioners should welcome the serving of due notice so that a valid award may issue.

Unless the incumbent and the Clerks are given notice, the Board will, as here, continue to ignore the admonition in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567, that the contracts of each union should be read in the light of the other, and in the light of custom, practice and usage under those contracts. If the petitioner Telegraphers' contract were read in the light of the Clerks' contract, that might even strengthen the Telegraphers' claim. Their contractual relations with the carrier antedated the Clerks' by twenty years.

This lawsuit presents the only known means to break this procedural bottleneck. In this respect, the case resembles *Order of Railway Conductors* v. *Swan*, 329 U.S. 520, where the Court stated (at p. 524):

> "We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by §3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation."

Here too judicial guidance is needed to resolve the confusion and delays caused by the failure to observe the command of the Railway Labor Act.

In *Rice* v. *Santa Fe Elevators Corp.*, 331 U. S. 218, the administrative agency might have decided the case before it in favor of the applicant for equitable relief. Nevertheless, this Court held that equitable relief was appropriate, on the ground that further proceedings were "beyond the reach" of the administrative agency (331 U. S. at p. 236). Here also, in the absence of notice, further proceedings before the Board are beyond its reach.

Likewise, in *Hillsborough* v. *Cromwell*, 326 U. S. 620, the plaintiff might have been successful on the merits in the New Jersey courts. Nevertheless, it was held that the federal district court might intervene on the ground of uncertainty as to the adequacy of the State remedy (326 U. S. at pp. 624-626).

In the instant case, the administrative remedy was completely inadequate, for the Board had already determined not to issue notice (R. 46).

The court below pointed out the special circumstances why equitable relief is appropriate here, stating (R. 54-55):

> "To . . . [protect its rights and property the carrier] must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights."

The issuance of a void award against this carrier is no chimera. The Board has already decided not to issue due notice (see p. 37, *supra*), so that any ensuing award would be void. Moreover, the Board has divided evenly on the

merits (R. 46), and a void "sustaining award" will issue against the carrier if the referee's vote is cast in favor of the Telegraphers. There are numerous reasons why in these circumstances the carrier has no other adequate relief from a void award against it. In the first place, the fact that it could defend against a suit to enforce the Board's decision on the ground that due notice was not given affords no real protection. Employees often resort to economic measures to enforce awards rather than risk enforcement suits. See, *e.g.*, *Grand Trunk Western R. R. Co.* v. *American Train Dispatchers Ass'n*, No. 53 C. 1595 (N.D. Ill., decided September 22, 1954); *Missouri-Kansas-Texas R. R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶ 68,671 (N.D. Ill., 1954), finding 111, p. 87, 269; "Railroad Labor Disputes and the National Railroad Adjustment Board", 18 Univ. of Chicago L. Rev. 303, 318 (1951); p. 23 of the 19th Annual Report of the National Mediation Board for 1953. Carriers should not have to comply with invalid awards to avoid labor unrest and then have to pay retroactively other claimants who subsequently obtain valid awards after due notice has been given. Even if a void award were set aside in enforcement proceedings, accumulated back-pay would be claimed in proceedings to enforce a later valid award reaching the same conclusion. Enforcement suits are normally not filed until nearly the end of the two-year statutory period (Section 3 First (q)), in order to present the carrier with a formidable claim. It is unrealistic for petitioners to minimize the financial harm that might ensue to the carrier, for numerous cases decided by the Board and courts show that this type of case frequently results in enormous claims which build up day by day until the awards are finally entered. For example, in *Missouri-Kansas-Texas Railroad Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N.D. Ill., 1954), the carrier was faced with potential

awards of $578,435 per annum (finding 164, p. 87,276). In Third Division dockets TE-6799 and TE-6800, together with companion claims, the amount was $8400 per month. In the instant case, this claim was filed in 1951. If an award should finally ensue in favor of Telegraphers, they will demand back-pay from 1949, when they claim the work was improperly done by a member of the Clerks. Furthermore, if the carrier should secure reversal of a doubtful award in an enforcement action, the Board would still not issue the proper notice (R. 47, 82, 83; see also Appendix, *infra*, p. 68), and this same action would have to be brought anew.

The brief of the amici curiae suggests (Br. 19) that if the award herein favors the Telegraphers, the carrier could then defend against a claim brought by the Clerks. This suggestion fails to recall that the carrier's submission to the Board contends that the work in question is clerical work (R. 36-37). Moreover, the later claim would be before another referee who would not have the benefit of the Telegraphers' contentions.

Unless notice is ordered to be given to the incumbent and his union in this proceeding, the carrier would not be afforded protection in complying with an award in favor of the claimant union. Yet a carrier should be entitled to have this controversy settled once and for all, in one proceeding, in order to avoid unrest among its employees, irremediable delay, conflicting awards, and expenses incident to defending against a number of awards. Cf. *Kirby* v. *Pennsylvania Railroad*, 188 F. 2d 793, 799 (C.A.3, 1951). It is grossly unfair for a carrier to be "double-barreled" by having conflicting awards against it, as happened in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 188 F. 2d 302 (C.A.7, 1951), and as threatened here (R. 48).

E. Mandatory Relief Is Appropriate.

Both courts below concluded that relief in the nature of mandamus is necessary to compel the Board to give the "due notice" required by Section 3 First (j) (R. 40, 56). No other means is available to obtain the issuance of notice.

In the absence of notice, not only would the Board be proceeding beyond its power, but any resulting award would be void. Relief in the nature of mandamus is necessary to correct the Board's constant flouting of the statute. As stated in *Allain* v. *Tummon*, 212 F. 2d 32, 35 (C.A.7, 1954):

> "In previous opinions we have commented on the reluctance, or indeed the unwillingness, of the Board to give notice to all 'employees involved' in disputes submitted to it. In the second Hunter case we said, 188 F. 2d 294, 300: 'In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient.' In the Illinois Central case we said, 212 F. 2d 22, 29: 'The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute.' From its action in the case at bar it is apparent that the Adjustment Board persists with unabated fervor in its often criticized practice."

In *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 540, the trial court granted a mandatory injunction direct-

ing the petitioner railway "to 'treat with' the Federation and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions * * *.'" The decree was affirmed by the court of appeals and, in turn, by this Court. Although the mandatory provisions of the decree were assailed, Mr. Justice Stone pointed out that the decree was properly devised to enforce a positive requirement of the Act, stating (at pp. 545, 551):

> "Neither the purposes of the later Act [the Railway Labor Act], as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra*, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.
>
> * * * * * *
>
> "It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority." (Additional citations omitted.)[12]

Similarly here, Section 3 First (j) is "mandatory in form", so that a mandatory injunction is justified to compel the Board to act in accordance with a mandatory provision of the Railway Labor Act, namely, Section 3 First (j). Cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548.

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12. *The Virginian* case was approved in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300-301, and *General Committee* v. *M-K-T Co.*, 320 U. S. 323, 331, 335, on which petitioners rely (Br. 17, 24, 43).

In *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, analogous provisions of the Railway Labor Act were described as follows (p. 207):

> "• • • the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected."

Here Section 3 First (j) is stated in the form of a command, and there is no practical mode of enforcement other than the obtaining of a mandatary injunction. An injunction without mandatory provisions would again leave the Board free to refuse to give due notice to the incumbent and his union, in accordance with its long-time practice of ignoring the statute.

In *Miguel* v. *McCarl*, 291 U. S. 442, the governing considerations for mandamus were set out. The Court stated (at pp. 451-452):

> "In *Roberts* v. *United States*, 176 U. S. 221, this court held that where the proper construction of a statute is clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus. The opinion points out (p. 231) that every such statute to some extent requires construction by the officer; that he must read the law and, therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is required to perform. 'But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial although depending upon a statute which requires, in some degree, a construction of its language by the

> officer. Unless this be so, the value of this writ is very greatly impaired.' This view of the matter has been uniformly approved in subsequent decisions. See, for example, *Lane* v. *Hoglund*, 244 U. S. 174, 181; *Wilbur* v. *Krushnic*, 280 U. S. 306, 318. The mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 31, 33."[13]

The duty to give notice imposed upon the Board by Section 3 First (j) is clearly ministerial, so that the Board should be "required * * * to discharge a duty laid upon" it by the statute. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 622-623.

Here the carrier is seeking to accomplish orderly administrative procedure. It is the Board which has departed from the statutory scheme. Moreover, being composed of five carrier members and five labor members, the Board is particularly stubborn in its adherence to partisan concepts. The sanction of the district court is sorely needed to secure compliance with the statute and end the conflict on notice which has existed for so many years. In order to correct

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13. See also *Adams* v. *Nagle*, 303 U. S. 532, 542-543; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123-124; *United States* ex rel. *Kansas City Southern Railway* v. *Interstate Commerce Commission*, 252 U. S. 178, 187, 188; *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. 2d 56, 58 (C. A. 7, 1954); *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 54 (C. A. D. C., 1953); *Higginson* v. *Schoeneman*, 190 F. 2d 32, 35 (C. A. D. C., 1951); *Grand International Brotherhood of Locomotive Engineers* v. *Morphy*, 109 F. 2d 576, 578 (C. A. 2, 1940).

Mandatory relief against the National Railroad Adjustment Board was considered appropriate in *Delaware & Hudson R. Corporation* v. *Williams*, 129 F. 2d 11 (C. A. 7, 1942), remanded in view of the death of the referee, 317 U. S. 600; *Patterson* v. *Chicago & Eastern Illinois R. Co.*, 50 F. Supp. 334 (N. D. Ill., 1943); and *Missouri-Kansas-Texas R. Co.* v. *National Railroad Adjustment Board*, 26 Labor Cases ¶68,671 (N. D. Ill., 1954).

the existing confusion in the Board on due notice, to promote uniformity by the Board, and to alleviate the persistent disregard of Section 3 First (j), the Carrier Members urge that mandatory relief is clearly required directing the Board to give notice to the incumbent and his union and to permit them to participate before the Board. The courts below have already recognized the appropriateness of such relief (R. 40, 56).

The case law holding that the Board must observe the due notice provisions of Section 3 First (j) of the Railway Labor Act was developed after years of abuse by the Board. The courts gave the Board ample opportunity to observe the notice requirements of the statute before they found it necessary to act. It was obviously the flagrant violation of the statute over the years that caused the Eighth Circuit to change its views and overrule *Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Co.*, 156 F. 2d 1 (C.A. 8, 1946), certiorari denied, 329 U. S. 758, by *Brotherhood of Railroad Trainmen* v. *Templeton*, 181 F. 2d 527 (C.A. 8, 1950), certiorari denied, 340 U. S. 823. The facts proved in the various due notice cases show that the Board has persistently failed to obey Section 3 First (j) and certainly justify judicial relief. The due notice cases decided by the courts do not mean that anyone can go to court at any time to complain of some procedural irregularity (cf. petitioners' Br. 13). They do mean that the courts have power to enforce the due notice command of Section 3 First (j).

The petitioners' contention (Br. 23, 24) that under the decisions below courts will have to resolve the question of which employees are entitled to due notice, ignores the judicial decisions and awards that have already determined that question (see pp. 13, 43, *supra*). Deadlocks on due notice have been caused not by any confusion as to which

employees should be given due notice but by the obstinate refusal of some Board members to admit that Section 3 First (j) exists. Such deadlocks can be readily resolved by compliance with the decision below. Furthermore, the petitioners' inconsistent contention that the courts can decide due notice issues in enforcement suits filed within two years from the entry of an invalid award (Br. 24-27) is not responsive to the intent of Congress that these matters shall be settled in a prompt and orderly manner (Section 2(5) of the Railway Labor Act).

The right to due notice, which is stated so explicitly in the statute, embodies elemental notions of justice, due process and fair play that would apply even in the absence of statute. To deny those most vitally concerned in a controversy the right to be heard, as petitioners would do, subverts principles fundamental to the administration of the law.

IV. THE WRIT OF CERTIORARI SHOULD BE DISMISSED.

A. Public Policy and Judicial Convenience Do Not Permit the Labor Members of the Board to Seek Review Herein.

The National Railroad Adjustment Board is an administrative body created under Act of Congress. The ten members thereof were named here as defendants in their status as members of the Third Division of the Board (R. 26). The Board appeared in this case (R. 41). The injunction was also entered against the ten individual defendants only "as members of and constituting the Third Division of said Board" (R. 41). The Board did not appeal, nor did five of the members or the referee (see R. 42). The appeal to the court below and the petition in this Court were thus presented by some members of the Board, but not a majority thereof.

Public policy and judicial convenience weigh against allowing a few individual members of a public agency to appeal on their own individual whims. Otherwise, the courts would see a parade of dissenting agency members filing their own petitions for review. For example, recently the National Labor Relations Board has been split on several rulings, with some very bitter dissents. Petitioners here would have this Court say that those dissenters could come into court by themselves and challenge their Board's ruling.

Thus, the petitioning members were only sued and were only enjoined in their capacity as Board members. However, the petitioning members appear here as individuals. In addition, the notice of appeal filed in the district court specifies that the appellants were appealing "from the order enjoining the defendant members" from proceeding further (R. 42), so that the propriety of the injunction against the Board is not before this Court. Therefore, this Court should dismiss the writ of certiorari.

B. The Intervenor Order of Railroad Telegraphers Also Has No Standing to Present the Petition to This Court.

Although the Order of Railroad Telegraphers intervened in this action in the district court (see R. 4), the order of the district court did not run against the Telegraphers and did not require them to do anything or forbid them from doing anything (R. 41).

This Court has long held that intervenors cannot appeal from an order which does not run against them just because the order will probably affect them indirectly. Very similar to this situation is *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577. There the City of Chicago intervened

in a federal district court action to enjoin administrative action, just as the Telegraphers intervened in the present action. There, as here, the district court issued a preliminary injunction. There, as here, the administrative body and the governmental authorities chose not to appeal. There, as here, the intervenor sought to appeal, asserting that the injunction hurt it, since there the injunction was against the enforcement of certain transit rates within the City. This Court dismissed that appeal because "the City of Chicago has no separate standing which entitles it to appeal from the decree" (284 U. S. at p. 578). This conformed to the long-held view of this Court that an intervenor must be more than indirectly interested to have standing to seek appellate review.

In another case, *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, the appealing party intervened in a federal court injunction proceeding, as the Telegraphers have intervened here. There the intervenor sought review of the order, arguing that the order directly affected its chances in an administrative proceeding. This Court held that the intervenor did not have "such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal," and therefore dismissed the appeal (321 U. S. at p. 634).

The intervenor Telegraphers cannot show that they have been aggrieved in a legally recognized way. They have asserted in their brief that bringing the Clerks and D. A. Shears into the Board proceedings will have no appreciable effect upon said proceedings (Br. 27-38). Therefore, they cannot now assert that they are aggrieved because the order below will interfere with the presentation of their claim before the Board. They cannot say they have been aggrieved by any delay to their claim since their vice presi-

dent, J. W. Whitehouse, is on the Board and can switch his vote so that the Board will properly proceed with this claim at any time it behooves the Telegraphers. It should be reiterated that no order has been entered against the Telegraphers.

This intervenor is unable to point to any separate standing to seek review here. Its legally recognized independent rights have not been violated by this preliminary injunction. Accordingly, as to the Telegraphers also, this Court should dismiss the writ of certiorari.

CONCLUSION

For the foregoing reasons, the Carrier Members of the Board believe that the judgment of the court of appeals, which epitomizes the views of 26 federal judges, should be affirmed or that the writ of certiorari should be dismissed.

Respectfully submitted,

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February 1955.

APPENDIX

Special Concurring Opinion In Award No. 6683. Docket No. CL-6614.

This is one of a line of four consecutive Awards entered by the Third Division on the same date. The full Opinion is found in Award No. 6680.

The referee makes reference in the full Opinion to what he calls the "Illinois Central case" and the "Allain case". These are respectively reported in 212 F. 2d 22[illegible]d 212 F. 2d 32. He points up the Court's language in the former case wherein it said, "At any rate, the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits with an opportunity for all parties to be heard." And in all four of these Awards he has dismissed the claim. Therefore, we think that our Awards in this series are compatible with the first alternative expressed in the Opinion of the United States Circuit Court of Appeals.

This Board (Division) is a bipartisan creature of statute and is composed of five Carrier Members and five Labor Members. It employs, pursuant to the Railway Labor Act, an Executive Secretary. While its duty to give due notice is clearly expressed in the statute, the subject has proven to be of a most litigious character. The Executive Secretary has followed the practice of not giving due notice in those instances where it has been ordered by a referee Award unless the Labor Members' Chairman joins in giving him such direction. That direction has been withheld by the Labor Members of this Board irrespective of the many Court Cases holding the giving of notice to be our non-discretionary duty.

We can only look to the law and its interpretation by the Courts for our guide in the administration of our duty. Where that function is checked in the face of such a clear expression of our duty as lies before us in many cases, we are impelled to explain our position and concur in this referee's action, which we think is to "proceed no further". Similarly, when an Award has the effect of ordering due notice, and the actual giving of it is withheld, we are again of the opinion that we are still "proceeding no further". Surely, there can be no accumulation of liability under any claim beyond the point where this Board has failed to comply with what has been so effectively enunciated as its statutory duty.

E. T. HORSLEY,
R. M. BUTLER,
W. H. CASTLE,
C. P. DUGAN,
J. E. KEMP.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHET AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131.

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHET AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

BRIEF FOR RESPONDENT, ILLINOIS CENTRAL RAILROAD COMPANY.

OPINION BELOW.

The District Court did not write an opinion. Its findings of fact, conclusions of law and order appear in the record at pages 35-41. The opinion of the Court of Appeals (R. 45-60) is reported in 212 F. 2nd 22.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 19, 1954 (R. 60). The petition for a writ of certiorari was filed June 11, 1954, and granted October 14, 1954 (R. 63). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code as amended.

QUESTIONS PRESENTED.

1. Whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice of hearings and opportunity to be heard to all "involved" employees and their unions.

2. Whether an employee performing certain work and his union are "involved" in a dispute before the Board between a railroad and another union claiming the same work.

3. Whether the courts may require the Board to discharge its statutory duty.

STATUTE INVOLVED.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

STATEMENT.

Contrary to statements in the brief of petitioners, this case is exactly what the court below said it is—an action "to require the Board to perform its statutory duty as a prerequisite to its authority to proceed" (R. 56).

In June, 1951, The Order of Railroad Telegraphers (hereinafter referred to as Telegraphers) instituted a proceeding against the Illinois Central Railroad Company (hereinafter called Illinois Central) before the National Railroad Adjustment Board, Third Division (hereinafter called Board) (R. 28). That proceeding involves a claim

of the Telegraphers to certain work at Palestine, Illinois, which work is presently done by D. A. Shears, a member of the craft or class represented by the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Clerks) (R. 28, 36).

After the Telegraphers' claim was filed with the Board, Illinois Central was informed in writing by the General Chairman of the Clerks that in the event the employment rights of the present incumbent of the position in question were adversely affected by the claim filed by the Telegraphers, the Clerks would present and prosecute a claim against Illinois Central based upon the same employment rights which are involved in the Telegraphers' proceeding (R. 30-31, 38).

There is no showing in the record that D. A. Shears, the incumbent of the position in question, has had notice, either actual or constructive, of the pending proceeding (R. 37).

On August 11, 1951, Illinois Central filed its submission with the Board, specifically setting forth, *inter alia*, that the work involved was being performed by a member of the Clerks and was plain, ordinary clerical work of the type customarily performed by clerical forces on Illinois Central's property and in the industry generally (R. 28, 36).

The ten-member Board deadlocked on the merits of the Telegraphers' case. As a result, the Mediation Board appointed a referee to resolve the deadlock on the merits pursuant to Section 3 First (l) of the Railway Labor Act (R. 27, 36).

In May, 1953, the proceeding before the Board came on for hearing. At that time the question of giving notice under Section 3 First (j) of the Railway Labor Act to D. A. Shears and the Clerks was considered by the Board

for the first time (R. 28-29, 37) through an objection made by a carrier member of the Board. He objected to proceeding with the case until the required due notice was served on involved employees whom he defined as "the Brotherhood of Railway Clerks, or constituents thereof" (R. 18, 19-20, 28-29, 37). Said carrier member of the Board further called the Board's attention to the fact that Illinois Central had been served with a notice of the Clerks' "intention to file and prosecute claim for the same work involved in this proceeding if the claim brought by the Telegraphers' organization is sustained" (R. 18). Thereupon, the Board went into an executive session to consider said objection and, pursuant to its custom, excluded the referee from consideration of the due notice question (R. 20, 29, 37). During this executive session, the ten regular members of the Board voted on the objection to proceeding with the case in the absence of notice under Section 3 First (j). The result was a tie vote and, therefore, the objection failed to carry (R. 19, 20, 29, 37). The public session of the Board was then reconvened. In accord with the usual practice of the Board, the referee was not requested to vote on the due notice question, nor did he request an opportunity to do so although the vote on the question had resulted in a tie (R. 18-19, 29, 37). The same carrier member again objected to further proceeding until the Board had given notice pursuant to Section 3 First (j) of the Railway Labor Act. Notwithstanding said objection, the hearing was resumed (R. 29, 37).

In May, 1953, Illinois Central filed a verified complaint in the District Court (R. 1) and thereafter moved for an order directing the Board to serve due notice upon D. A. Shears and upon the Clerks, or, in the alternative, enjoining further proceedings by the Board until such notice was served (R. 3).

The complaint set forth that for several years the Board has denied and continues to deny the right of participa-

tion in proceedings before it to any persons not formally served with notice and that such practice violates the Railway Labor Act and the due process clause of the Fifth Amendment (R. 30).

The Telegraphers were permitted to intervene and file an answer (R. 1, 11-15). The carrier members of the Board also filed an answer to the complaint (R. 15-26).

In their answer, the five carrier members of the Board admitted:

> (a) That Section 3 First (j) of the Railway Labor Act requires that due notice be given to D. A. Shears and the Clerks (R. 16).
>
> (b) That the First Division of the National Railroad Adjustment Board complies with the due notice provision of Section 3 First (j) of the Act (R. 16).
>
> (c) That the Department of Justice refused to represent the Third Division of the National Railroad Adjustment Board in *Allain* v. *National Railroad Adjustment Board*, 120 F. Supp. 453 (N. D. Ill. 1953), affirmed 212 F. 2nd 32, C. A. 7 (1954), on the ground that said Division's failure to give due notice deprived employees of their constitutional and statutory rights (R. 16-17, 23-25, 51).
>
> (d) That the five carrier members are willing to serve the requisite due notice but that the five labor members are unwilling to do so (R. 17).
>
> (e) That only persons receiving due notice pursuant to Section 3 First (j) of the Railway Labor Act are permitted to participate in proceedings before the Board (R. 17-18) and that persons having merely actual notice of proceedings before the Board are not permitted to participate therein (R. 26).

The District Court entered findings of fact and conclusions of law in favor of Illinois Central (R. 35-40) and issued a preliminary injunction which enjoined the Board from proceeding with the defendant Telegraphers' claim

(a) until the Board gives formal notice to D. A. Shears and the Clerks and (b) permits said persons to participate in the proceedings before the Board (R. 40-41).

The labor members of the Board and the Telegraphers appealed from the order of the District Court (R. 42) but neither the Board nor the referee appealed. The Court of Appeals affirmed the order of the District Court, Judge Swaim dissenting[1] (R. 45-60).

[1] Less than three months later Judge Swaim, as one of the Judges of a unanimous court, ordered the First Division of the Board to reopen five of its dockets and to give notice and an opportunity to be heard to employees involved in those dockets in which five awards (rendered in 1942) had been declared void because the Board had failed to comply with Section 3 First (j) of the Act. *Brotherhood of Railroad Trainmen* v. *Swan*, C. A. 7 (1954), 214 F. (2d) 56. Prior to his appointment to the federal bench, Judge Swaim, while acting as a referee for the Third Division, held that notice under Section 3 First (j), was required to be given only to the claimant and the carrier.

SUMMARY OF ARGUMENT.

I.

The Board did not appeal. Neither the referee nor the five carrier members of the Board appealed. In the absence of an appeal by the Board, the individual labor members, who do not represent the Board or even a majority of the Board, have no standing to prosecute an appeal from an order which does not affect them in their individual capacities.

Telegraphers, only intervenor in this case, have no standing to progress an appeal from an order which does not run against them merely because the order may affect them indirectly. *Boston Tow Boat Co.* v. *U. S.*, 321 U. S. 632.

II.

Railway Labor Act requires that Board give notice to all employees and crafts involved in dispute before Board. Word "shall" in Section 3 First (j) of Act is used in its imperative and mandatory sense. Employee who will be displaced if claim before Board is sustained is an "involved" employee. Craft to which such employee belongs is also involved in such dispute. Courts have uniformly held that one presently doing work which is claimed before the Board and his union are "involved." Legislative history of Act shows it was the intent of Congress that the employee who will be displaced if claim is sustained and also his union should be given an opportunity to be heard before the Board.

After giving the requisite statutory notice and opportunity to be heard, it is for the Board to decide which contract applies or whether they overlap. *Order of Con-*

ductors v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

The Board should follow the mandate of Congress in order that it may issue a valid and binding award that will accord protection to the carrier and all employees and unions involved in the dispute.

III.

There is no showing that the individual doing the work claimed before the Board has actual notice. Actual notice does not meet the requirements of due process as the Board only permits those having received "formal notice" to participate in the proceedings. Fundamental requisite of due process is opportunity to be heard. Illinois Central is entitled to have all employees and unions who are "involved" in disputes before the Board given notice and opportunity to be heard.

IV.

Rule requiring exhaustion of administrative remedies does not apply where, as here, defect urged goes to the jurisdiction of the administrative agency. Compliance with jurisdictional requirements of statute is not a discretionary matter. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. If an administrative agency refuses to comply with a statutory command, it nullifies its most essential duties.

Case or controversy arises when question respecting laws of the United States has assumed such form that judicial power is capable of acting on it, a declaration on rights as they stand is sought and when there is an actual controversy over the issue. *In Re Summers*, 325 U. S. 561.

The defense of an enforcement suit under Section 3

First (p) of the Railway Labor Act is neither an exclusive nor an adequate remedy. The defense of such a suit will not secure the service of the notice required by Section 3 First (j) of said Act. The Board can be compelled to obey the mandate of Congress.

Failure of the Board to give requisite notice invalidates its decision or award. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 797; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534. It is not uncommon for labor organizations to forego judicial enforcement of an award in favor of economic enforcement, *i. e.*, strike threats. Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, p. 23, lines 8-10; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, (D. C. N. D. Ill. 1954), 26 Labor Cases, ¶ 68,671, finding 111. Failure of Board to serve notice extends period during which Illinois Central is subjected to possible obligation of double payments for one position. Compliance with or defiance of award entered without the requisite notice would be certain to result in additional claims or litigation by employee refused employment or by his union. Controversial matters concerning same work can and should be considered in one proceeding before the Board. It is well-settled that courts have jurisdiction to enforce the commands of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515.

V.

Judicial intervention is required to rectify the Board's disregard of the notice requirements of Section 3 First (j). Board's failure to follow the mandate of Congress (to give notice and an opportunity to be heard to employees and unions involved in a dispute) and the directions of this Court in *Order of Conductors* v. *Pitney*, 326 U. S. 561 and *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (to con-

strue the Telegraphers' contract with the railroad in the light of the Clerks' contract with the railroad, taking into account evidence as to usage, practice and custom), results in "a jurisdictional frustration on an administrative level". *Order of Conductors* v. *Swan*, 329 U. S. 529. Refusal of Board to serve requisite notice upon employees and their unions involved in disputes and to give such employees and unions an opportunity to be heard thwarts the objective of the Railway Labor Act. There is no finality to the Board's awards which are void for lack of jurisdiction. Board cannot properly construe the rights of the respective employees and crafts, giving due regard to usage, custom and practice, unless the carrier and all employees and unions involved in the dispute are before the Board. In an enforcement action, a carrier would not be permitted to implead an employee and a union who were not before the Board although they are involved in the dispute. Employee or union bringing enforcement suit can select a forum where carrier would not be able to get service upon an employee or union involved in the dispute.

ARGUMENT.

I.

PETITIONERS HAVE NO STANDING TO PROGRESS THIS CASE.

It is respectfully submitted that the appeal in this case should be dismissed for reasons hereinafter presented which have not been heretofore considered by this Court.

A. The Board Has Not Appealed From the Order of the District Court and the Board Has Not Sought Certiorari From This Court.

The National Railroad Adjustment Board is an administrative agency created under Act of Congress. The Third Division thereof consists of ten members, five of whom are selected by railroad unions and represent railroad labor and five of whom are selected by the rail carriers and represent the carriers [45 U. S. C. 153 First (h)]. The ten members of the Third Division were named in this proceeding as defendants only in their status as members of the Board (R. 26). The Board appeared in the case (R. 33) and the injunction was entered against the Board (R. 41). Although the injunction was entered against the ten individuals, it only applied to them "as members of and constituting the Third Division of said Board" (R. 41). The Board did not appeal (R. 42). Neither the referee nor the five carrier members of the Board appealed (R. 42). In fact, the five carrier members of the Board filed an answer in the District Court admitting that Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] requires the service of notice upon involved employees; admitting that Shears and the Clerks

are "involved" employees and alleging that they have been, and are, willing for the Board to serve due notice as required, but that the five labor members are unwilling to do so (R. 16-17). Thus it appears that the appeal to the court below and the petition in this Court were not presented by the Board or even by a majority of the Board.

It is respectfully urged that, in the absence of an appeal by the Board itself, the five dissenting individual labor members, who do not constitute a majority, have no standing to prosecute an appeal from the order of the court below, which order does not affect them in their individual capacities. A contrary rule would allow the dissenting members of any public agency to progress an appeal if they so desired.

B. Intervenor The Order of Railroad Telegraphers Has No Standing to Progress This Case.

Although the Telegraphers intervened in this case in the District Court (R. 4), the order of the District Court does not run against that organization and does not require it to do anything or forbid it from doing anything (R. 41).

This Court has, in the past, held intervenors cannot appeal from an order which does not run against them just because the order might affect them indirectly. *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577; *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632.

In the *Chicago Rapid Transit* case (284 U. S. 577) the City of Chicago intervened in a federal District Court action which was brought to enjoin administrative action. The District Court issued a preliminary injunction from which the administrative body and the governmental authorities chose not to appeal. The intervenor sought to appeal, asserting that the injunction would harm

it since the injunction was against the enforcement of certain transit rates within the City. In dismissing that appeal, this Court said (284 U. S. 578), "The City of Chicago has no separate standing which entitles it to appeal from the decree." To the same effect is the language of this Court in the *Boston Tow Boat* case (321 U. S. 632, 634) wherein the Court said that the intervenor there did not have "such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal."

II.

PREFACE TO ARGUMENT ON THE MERITS.

Before answering Petitioners' arguments, respondent Illinois Central has, for the convenience of the Court, listed similar arguments and the answers made thereto by the court below in its decision in the instant case and in what might be termed its companion case, *Allain* v. *Tumnon et al.*, C. A. 7 (1954), 212 F. (2d) 32.

ILLINOIS CENTRAL RAILROAD COMPANY,

v.

J. W. WHITEHOUSE, ET AL.

C. A. 7 (1954), 212 F. (2d) 22.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.	HOW THE COURT OF APPEALS ANSWERED IT.
R. 51. "Telegraphers in its brief states that the action is premature because 'The Board's decision may be in accord with the railroad's contentions'. Closely allied with this issue is that the district court was without jurisdiction to grant an injunction 'because the railroad	R. 51. "This brings us at once to the contention advanced by the Carrier that the Referee is without authority to participate in a decision as to whom notice shall be served upon but that such determination must be made by the Board as originally constituted. No authority

has failed to exhaust its administrative remedies'. Relative to the former contention, it is argued that the Carrier 'may never be hurt by the allegedly improper procedure the Board is following' because the Board, if permitted to decide, 'may decide for the railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the railroad'. It is asserted that the Board, with the Referee sitting as a member, may decide the issues favorably to the railroad and that in fact the Board has, with the Referee sitting as a member, denied a number of awards because of the lack of notice to third parties." (212 F. (2d) 27.)

is cited and we know of none where this question has been decided but we are [R. 52] convinced from our study of the statute that the contention is sound. The first duty or obligation imposed upon the Board after a claim has been filed is that contained in (j) (heretofore quoted). That paragraph contains the unequivocal command that the Board 'shall give due notice of all hearings.' At that stage of the proceeding, it appears plain that there is no Referee and there could not be, by reason of the subsequent provisions which define the conditions and circumstances under which a Referee may be brought into the proceeding".

"Paragraph (l) provides that 'upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members,' such division shall agree and 'select a neutral person, to be known as "referee," to sit with the division as a member thereof and make an award.' In case the members of the division are unable to agree upon and select a referee, then such fact may be certified to the Mediation Board, which shall select and name the Referee, 'to sit with the division as a member thereof, and make an award.' It appears certain that paragraph (l), providing for the selection of a Referee, presupposes that the Board has complied with the 'due notice' provision of paragraph (j). Moreover, the Referee, whether selected by members of the division or by the Mediation Board, is authorized to sit as a

member of the Board only for the purpose of 'making an award.' His authority to sit as a member for that purpose bears no relation to the obligation imposed upon the Board to give 'due notice.' That the Board is without power to proceed until it has complied with the 'due notice' requirement of paragraph (j) is evidenced by the fact that an award made in the absence of such notice is void, and a study of the relevant provisions of the statute leaves little, if any, room for doubt but that the selection of a Referee is authorized only in the event that the division is deadlocked or unable to agree on the making of an award. In such case, a Referee is selected evidently to break the deadlock or, in the language of the statute, 'to sit * * * as a member * * * and make an award.' It appears that the Board recognized this limited authority of the Referee because he did not participate or at any rate did not vote on the notice controversy." (212 F. (2d) 27-28.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 52. "Telegraphers in its brief further states, 'We cannot assume that the Board will make an erroneous decision. [R. 53.] In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision', and 'To be sure, the Board might make a decision that would turn out, on appropriate judicial review to be wrong. But the mere possibility

HOW THE COURT OF APPEALS ANSWERED IT.

R. 53. "This argument, if can be thus dignified, begs the whole question. It is based on the false assumption that the Board possesses the power to make an award without giving 'due notice' and an opportunity to involved parties to be heard. Obviously the Court has not and will not advise the Board as to the kind of decision it should make. On that score we at present have no concern. The

of an erroneous decision is hardly the basis for enjoining administrative action.'" 212 F. (2d) 28.

point is that the Board, under the situation existing, is without power to make any decision, right or wrong. And it must be remembered that the order under review does nothing more than restrain the Board from proceeding until it has complied with the statutory command."

"The only case called to our attention where a restraining order has been issued under circumstances similar to those here is that of *Townsend* v. *National Railroad Adjustment Board*, Fourth Division, D. C. N. D. Ill., 117 F. Supp. 654, 658 (Judge Campbell). In that case, it was the Fourth Division which refused to give notice under Sec. 153 sub. 1 (j), and the court issued an order in form almost identical to that of the present case. There, as here, the jurisdiction or authority of the court was under attack. The court * * * stated: 'Congress has commanded in express terms that the several divisions of the N. R. A. B. "shall give due notice of all hearings to the employee or employees * * * involved in any disputes submitted to them"; but Congress has not expressly defined a remedy for employees involved in a dispute who have not been given notice. If a district court lacked jurisdiction to order that notice be given, the "right" to notice conferred by Section 3 would become mere verbiage, a right without a remedy. Congress could not have intended that result'. We think that is a sound statement. True, it was made in a case where the relief sought was by an [R. 54] aggrieved employee rather than

by the Carrier, as here, but even so, we discern no difference insofar as the jurisdictional issue is concerned." 212 F. (2d) 28.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 54. "* * * we are urged to hold it [the Board] should be permitted to proceed to a hearing and a decision on the merits as a pre-requisite to the right of a court of equity to interfere."

HOW THE COURT OF APPEALS ANSWERED IT.

R. 54. "Here the Board has had an opportunity to pass upon the notice issue and has refused to comply with the statute, * * * Thus, a court [according to this agreement], before it can interfere, must sit idly by until the Board has engaged in a mock proceeding. Such reasoning is devoid of all logic."

R. 54. Telegraphers contend "that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits." 212 F. (2d) 29.

R. 54. "We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the [R. 55] Carrier is threatened not only with an abortive proceeding before the Board but by the Clerks in an action concerning the same employment rights." 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 55. Telegraphers contend "that the action must fail because it is shown that the Clerks had actual notice and that [as] it was the representative of Shears," he likewise had actual notice. 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 55. We think the contention that the action must fail because it is shown that the Clerks had actual notice and that it was the representative of Shears is likewise, under the circumstances, without merit for

a number of reasons. It is true that actual notice has been recognized as sufficient in some of the cases where the attack was upon the validity of the award. Here, however, it is sought to be utilized as a justification for the Board's refusal to comply with the statute. More than that, under the statute the employee (Shears) was entitled to notice the same as the Clerks, and it is not shown that he had notice of any kind. Of more importance, however, is the fact that actual notice would have served no purpose insofar as it afforded protection to the Clerks or Shears of either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with that kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

"* * * It is asserted that the Clerks and Shears had no desire to be heard." 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 55. "Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes fur-

nishes the basis for protracted litigation. Instead of [R. 56] serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute." 212 F. (2d) 29.

ARGUMENT MADE BY THE ORDER OF RAILROAD TELEGRAPHERS.

R. 56. "Telegraphers argues, and we assume it is the Board's position, that the Board is without authority to consider two agreements simultaneously and for that reason notice was not required to be served upon the Clerks or Shears." 212 F. (2d) 29.

HOW THE COURT OF APPEALS ANSWERED IT.

R. 56. "That contention has been rejected by this court in *Missouri-Kansas-Texas R. Co. et al.* v. *Brotherhood of Ry. & S. S. Clerks et al.*, 188 F. 2d 302. Referring to *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, this court stated (page 306): 'That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, "O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood." ' 212 F. (2d) 29-30.

Allain v. Tummon, et al.

C. A. 7 (1954) 212 F. (2d) 32.

Argument of Union.

"The Brotherhood argues that the decision in the case at bar should not be governed by the rule announced in the decisions by this Court hereinbefore quoted, because the claim it submitted to the Board upon behalf of the dining car stewards was for money damages only. The Brotherhood says that it did not ask that plaintiffs be removed as tavern car attendants; hence plaintiffs were not 'employees' involved in the dispute between the dining car stewards and the Carrier." 212 F. (2d) 36.

How the Court of Appeals Answered It.

"The Carrier admitted that it displaced the plaintiffs from their jobs as attendants in the lounge-buffet cars because of Award No. 5123, and the order made pursuant thereto." 212 F. (2d) 36.

Argument of Union.

"We note the contention of the Brotherhood that the Carrier instead of replacing the plaintiffs with dining car stewards might have discontinued serving food in the lounge-buffet car or might have attempted to obtain an amendment of its contract with the dining car stewards." 212 F. (2d) 36.

How the Court of Appeals Answered It.

"However, we hold that in presenting its claim to the Board the Brotherhood was in effect asking that the plaintiffs be replaced by dining car stewards. It follows that the plaintiffs were 'employees' involved in the dispute within the meaning of § 3, first (j) of the Railway Labor Act, and, having received no notice of the hearing and in any event being unable to participate in the hearing, the Adjustment Board was without jurisdiction to promulgate or render Award No. 5123 and its accompanying order.'" 212 F. (2d) 36.

III.

THE RAILWAY LABOR ACT REQUIRES THAT NOTICE SHALL BE GIVEN TO ALL EMPLOYEES AND UNIONS INVOLVED IN DISPUTES BEFORE THE BOARD.

The single issue in this case is whether or not the Board is required to give D. A. Shears and the Clerks notice, as required by Section 3 First (j) of the Act, in a proceeding instituted by the Telegraphers in which that organization is claiming for its members the right to perform work presently done by Shears, a member of the Clerks' union.

Petitioners, in their brief, misrepresent the position of Illinois Central. It is not the position of Illinois Central that "the federal courts [should] require the Board to pass upon questions of craft jurisdiction and abrogate, in whole or in part, contracts between carriers and labor organizations" (Br. 30). It is the position of Illinois Central that Section 3 First (j) of the Railway Labor Act requires the Board to give notice to all employees and their unions "involved" in any dispute submitted to it and that in resolving such dispute the Board must consider the agreements of each in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. *Order of Conductors of America* v. *Pitney*, 326 U. S. 561, 567; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239.

Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board *shall give due notice* of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." (Emphasis supplied.)

This language of the statute clearly shows Congress intended to safeguard the rights of all persons who might be affected by an award by requiring the Board to give such persons due notice of the proceeding. The word "shall" when appearing in a statute is presumed to be used in its imperative and mandatory sense. This is particularly so when, as in this case, the word "shall" is addressed to those acting in a quasi-judicial capacity and a contrary construction will destroy a right which is given or preserved by use of the word. No other construction of the word "shall" as it appears in the above section could be inferred, for it is essential to the proper administration of justice that formal notice be given to all who may be adversely affected in any proceedings of a quasi-judicial nature. This principle is concisely stated in Merrill on Notice,[1] as follows:

> "* * * if the administrative body acts judicially, notice and opportunity for hearing are indispensable to due process."

If then, the Clerks and D. A. Shears are "involved" in the proceeding before the Board, the requirements of due process dictate that notice must be served upon each of them. In its claim, filed with the Board, the Telegraphers demand the right to perform certain work presently done by D. A. Shears (R. 28, 36). In other words, the Telegraphers seek to transfer to a telegrapher the work now being done by a clerk. Under these circumstances there can be no doubt that Shears and the Clerks are "involved" within the meaning of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)] in the proceeding before the Board. Petitioners have stated (Br. 35) that "until the complaint was filed in this action,

[1] Merrill on Notice, First Edition (1952), Volume 1, Chapter 11, Section 517, page 507.

it had apparently never occurred to anyone that in a situation where the person performing the claimed work was himself covered by a collective bargaining agreement, notice was required to such person." Contrary to Petitioners' statement, the courts have, since 1936, uniformly held that under conditions similar to those existing in this case, Section 3 First (j) of the Railway Labor Act requires that notice be served upon those whose jobs and job rights are sought or affected by the claims of others. *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, 305-306; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1948), 171 F. 2d 594; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, 300-301; *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2d 768, 770; *Brotherhood* v. *Pennsylvania R. Co.*, D. C. W. D. Penn. (1952), 107 F. Supp. 924, 927; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2d 481, 484; *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2d 32; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671 (copied in full in Appendix, pp. 1-86).[2]

In *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, the Court said (p. 306):

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[2] Although petitioners allege that the case of *Order of Railroad Telegraphers* v. *N. O. T. & M. R. Co.*, C. A. 8 (1946), 156 F. 2d 1, is in conflict with the decisions cited above, a careful reading of that case will disclose that the court did not pass upon the notice question. In any event the Eighth Circuit has more recently held that notice and an opportunity to be heard must be given to all employees and unions involved in disputes before the Board in accordance with the requirements of Section 3, First (j) of the Act. *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, certiorari denied 340 U. S. 823, rehearing denied 340 U. S. 885. To the same effect is *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, D. C. E. D. Mo. (1954), 26 Labor Cases ¶ 68,622.

> "We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees."

In *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, the Court, in dealing with the question of "involved" employees before the Board, said (pp. 300-301):

> "In spite of adverse court rulings the Adjustment Board apparently persists in the practice of giving notice only to the named parties to a proceeding. In many cases such a notice is insufficient. We so held on the previous appeal of this case. * * * To say that the train porters are not involved in a dispute which may result in brakemen supplanting them in their jobs is so unrealistic as to be absurd. Surely the employee who has a certain job is as much interested in that job as another employee who is trying to take it away from him."

In *Brotherhood* v. *Pennsylvania R. Co.*, 107 F. Supp. 924, the United States District Court for the Western District of Pennsylvania had the following to say about who were "involved" employees (p. 927):

> "We, therefore, must examine the facts before us to determine if defendant's employees were and are involved in the dispute. *It is clear, and the cases so hold, that if A and B both want to perform the same job and the Board holds a hearing to determine which is entitled to perform the job both A and B are involved in the dispute and must receive notice of the hearing.*" (Emphasis supplied.)

Applying the letters used in the above quotation to the case at bar, "A" represents the Telegraphers and "B" represents D. A. Shears and the Clerks. Both want to perform the same work and the right to such work is the subject matter of the proceeding before the Board. The

application of the above statement of law to the instant case clearly shows that notice to D. A. Shears and the Clerks is required.

In *Estes* v. *Union Terminal Co.* (1937), 89 F. 2d 768, the Circuit Court of Appeals for the Fifth Circuit said (p. 770):

> "But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * The order of the Board required his dismissal. No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. * * * It is not necessary for an employee to be named as a party to the proceeding before the Board to be involved in the controversy within the meaning of the law."

In the recent case of *Allain* v. *National Railroad Adjustment Board,* N. D. Ill. (1953), 120 F. Supp. 453, affirmed (C. A. 7 1954) 212 F. 2d 32, the Department of Justice refused to represent the Board because of the Board's failure to give due notice (as in this case) (R. 24). The Department of Justice informed the Board, in part (R. 25):

> "It is thus clear that the courts have definitely determined that aggrieved individuals are entitled to notice in cases before the Adjustment Board, and that when such notice is not given, the Board's order is void. Since we think these decisions are entirely sound, we could not make a contrary contention on your behalf. We are not suggesting that you obtain private counsel in support of what we believe to be an erroneous and hopeless position. But if this Department appears on your behalf, it would necessarily confess error in the case."

That such construction of Section 3 First (j) is proper and that Congress intended notice to be served on *all*

"employees * * * involved in any dispute submitted" to the Board is patently shown by the legislative history of that Section. During the 1934 hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong. 2nd Sess., the following colloquy occurred between Commissioner Eastman, the author of the bill, and Representative Kenney (p. 51):

> "Mr. Kenney. Mr. Eastman, a dispute of considerable importance might arise. Under this bill would all the labor unions, on any matter that might arise, have a right to be heard on the question?
>
> "Commissioner Eastman. You mean before the Adjustment Board?
>
> "Mr. Kenney. Yes. If a company union raised a question before the Board would the standard union also have the right to appear and be heard on the matter?
>
> "Commissioner Eastman. There is a special provision on page 16, paragraph (j):
>
> > "'Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.'
>
> "Mr. Kenney. They might not be directly involved, but the principle may affect them. Do you think this provision is broad enough to give the right to the standard union to appear in respect to that right before the Board on questions raised by the company union?
>
> "Commissioner Eastman. Well, I think that that is intended to be quite broad. These questions that come before the Adjustment Board relate to minor matters, to grievances and to interpretations of existing rules, and so on, and it would be my view that that paragraph [Section 3 First (j)] gives the parties the opportunity

to be heard in person, if they care to be heard, and by counsel, or by other representatives.

"Mr. Kenney. That is, from the various unions?

"Commissioner Eastman. Yes."

Petitioners argue, however, assuming notice must be served on the Clerks and D. A. Shears, that the Board can still serve such notice as that is one of the questions pending before the Board for decision (Br. 20). Petitioners should not now be heard to say that the Board (meaning the referee) can still decide the notice question when the labor members, including a vice-president of the Telegraphers, participated in forming a policy which excludes the referee from the consideration of that question (R. 20, 26, 29, 37). Moreover, such a contention is wholly unsound, because the Board has already decided not to give such notice (R. 42), and the requirement of notice is one of the ministerial duties imposed upon the Board, which duty must be met before the Board obtains jurisdiction. The language employed in Section 3 First (j) of the Railway Labor Act prescribes and defines this duty with such precision and certainty that nothing is left to the exercise of the Board's discretion or judgment. In other words, the duty is so plainly prescribed as to be a positive command to the Board, which command must be obeyed before jurisdiction is obtained over the merits of the case. *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 799. It is not within the province of the Board to decide when or whether notice should be given to employees and unions involved in the dispute. Congress, by the enactment of Section 3 First (j) of the Railway Labor Act [45 U. S. C. 153 First (j)], has foreclosed the Board from withholding notice in such circumstances. If the Board refuses to comply with the positive mandate of Congress, then it is not only within the province of the Court but also

its duty to direct the Board to comply with the requirements of the statute, which are so clearly set forth as to be beyond dispute. As this Court stated in *Wilbur* v. *United States,* 281 U. S. 206, 218:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. * * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

We ask the Court to keep uppermost in mind that Illinois Central is not attempting to stay the ultimate determination of the merits by the Board but, on the contrary, is attempting to require the Board to follow the positive mandate of Congress in order that the Board may retain jurisdiction and issue a valid and binding award that will accord Illinois Central and all employees and unions involved in the dispute the protection to which they are entitled. It is obvious from the verified complaint (R. 26-33), as well as from the character of the remedy sought (R. 32), that the Court is not called upon to decide a controversy growing out of a duty performed by the Board under the Railway Labor Act. Rather does the controversy involve a refusal of the Board to discharge a substantive duty which the Railway Labor Act exacts.

Petitioners, throughout their brief, seek to leave the erroneous impression that in this case Illinois Central seeks to be relieved from overlapping contracts. Such is not the case. Illinois Central is only seeking to have the Board interpret, in one proceeding, the contracts of the Telegraphers and the Clerks in the light of each other, giving due regard to usage, custom and practice. Although Illinois Central contends the work in question is

plain, ordinary clerical work of the type customarily performed by clerical forces on its property and in the industry generally (R. 28), it is for the Board to decide which contract (if either) applies or whether they overlap.

The case initiated by the Telegraphers before the Board is the type of controversy which the National Railroad Adjustment Board was established to resolve once it obtains jurisdiction. However, in doing so, this Court has held that contracts must be read in the light of each other with "evidence as to usage, practice and custom * * * taken into account and properly understood." *Order of Conductors* v. *Pitney,* 326 U. S. 561, 567; *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239.

In *Order of Conductors* v. *Pitney,* 326 U. S. 561 (hereafter more fully discussed in this brief at pp. 64-65) this Court held that the National Railroad Adjustment Board is the tribunal designated by Congress to adjudicate a jurisdictional dispute involving a railroad and two labor unions claiming the same work under their respective contracts. After declaring that the Board is an agency "peculiarly competent to handle the basic question here involved" (p. 566) and "to interpret contracts such as these in order finally to settle a labor dispute" (p. 565) the Court emphasized the duties of the Board as follows (pp. 566-567):

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. (Citing cases.) For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood."

That this Court meant exactly what it said and has, in effect, passed upon the identical issue presented in this case is made crystal clear by denying the petition for rehearing filed in this Court by the Order of Railway Conductors on February 6, 1946. In its petition for rehearing, the Conductors' organization pointed out (pp. 2-5):

2 "The majority opinion has inadvertently failed to give consideration to the statutory limitations on the jurisdiction of the Adjustment Board.

"The Court has accorded the Board a more extensive jurisdiction than that granted to it by Congress. Congress limited the jurisdiction of the Board to disputes between carriers and employees and did not grant jurisdiction to the Board to hear and decide 'jurisdictional disputes' between *two* distinct crafts and classes of employees. In establishing the Board, Congress created a bi-partisan body, equally divided between representatives of management and labor."

* * *

3 "Obviously, Congress did not intend to establish a bi-partisan board and endow it with jurisdiction to determine 'jurisdictional disputes' fundamentally involving two different crafts and only incidentally involving management. Otherwise the balance of representation is broken and the advantages of a bi-partisan board are destroyed. If 'jurisdictional disputes' between two or more crafts were to be submitted to such a board, the labor representatives on the board would be split by their respective individual interests in the controversy and the carrier representatives would be inclined to remain united. The result would be that a group of employees, or their statutory representatives, aggrieved by carrier action in these circumstances, would be forced to submit the controversy to a division of the Adjustment Board one of whose labor members is hostile to its position, with the decision resting in the hands of the carrier members entirely. The advantage of balanced representation with submission of deadlocked cases to a neutral referee would

be destroyed and an instrument of oppression would be placed in the carrier's hands.

"There is no indication in the historical or legislative history[2] of the Railway Labor Act, or the terminology or statutory scheme of the Act, that Congress
4 intended this bi-partisan board to decide 'jurisdictional disputes' between two rival statutory representatives. The Act confers jurisdiction to decide disputes 'between an employee or group of employees *and* a carrier or carriers.' Disputes submitted to the Board are to be handled 'in the *usual* manner up to and including the chief operating officer of the carrier.' These are the 'minor disputes.' If unadjusted, *either* party 'may refer the disputes to the Adjustment Board.' The Act anticipates that deadlocks will likely result between carrier and labor members. Awards shall be binding 'upon both parties to the dispute.' Upon an award 'in favor of *the petitioner*, the division of the board shall make an order, *directed to the carrier.*'

"Throughout Section 3, the Act refers to *two* adversary parties—the employees on the one hand and the carrier on the other. No provision is made for the submission or decision of a tripartite dispute between two adversary crafts of employees and a carrier adversary to one craft or perhaps *neutral as between them.* Although no jurisdiction is granted to the Adjustment Board to decide 'jurisdictional disputes,' the majority opinion states:

" 'For ORC's agreement with the railroad must be read *in the light of others between the railroad and BRT.* And since *all* parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood • • •. But the court should not have interpreted the con-

"2. The record on reargument in the *Elgin, Joliet and Eastern Railway Company* v. *Burley*, 327 U. S. 661, discloses the historical and legislative background of this section to which reference is hereby made."

tracts for the purposes of finally adjudicating *the disputes between the unions* and the railroad. The dismissal of the complaint should therefore be stayed by the District court, so as to give an opportunity for application to the Adjustment Board *for an interpretation of the agreements. Any* rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.' (Emphasis supplied.)"

5 "The court imputes a far broader jurisdiction to the Adjustment Board than was granted to it in the Act."

With this information before it this Court, on February 11, 1946, denied the petition for rehearing (327 U. S. 814). In spite of the finality of the language of this Court in the *Pitney* case, a further dispute involving jurisdiction between the Telegraphers and the Clerks again reached this Court in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. The nature of that dispute was stated by the Court as follows (p. 240):

> "A dispute arose between the two unions concerning the scope of their respective agreements. Each claimed for its members certain jobs in the railroad yards at Elmira, New York. The railroad agreed with the Clerks' Union. The chairman of Telegraphers protested, urging reassignment of the work to members of his union and claiming back pay on behalf of certain individual members."

After pointing out that the first declared purpose of the Railway Labor Act is to "avoid any interruption to commerce or to the operation of any carrier engaged therein" (Railway Labor Act, Sec. 2; 45 U. S. C. Sec. 151a(1)), the Court stated that this purpose "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements" and that the "plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that

might be provocative of strikes" (p. 242). The Court then declared that "this type of grievance (contractual jurisdictional disputes) has long been considered a potent cause of friction leading to strikes"; that "it was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers"; that, in 1934, this voluntary machinery was replaced by "a National Adjustment Board composed of representatives of railroads and unions"; that the 1934 Act "thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements"; and that "the Adjustment Board is well equipped to exercise its congressionally imposed functions" (pp. 242-243). Accordingly, this Court, following its decision in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 566-567, denied the railroad company's right to a declaratory judgment, holding that "the jurisdiction of the Board to adjust grievances and disputes of the type involved is exclusive" (p. 244). In so doing, the Court said:

> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors* v. *Pitney*. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. * * *' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at pages 567-568." (*Slocum* case, pp. 243-244.)

The directions of this Court did not leave the Board free to take up contractual jurisdictional disputes piecemeal and to hear the Clerks and Telegraphers separately, as the Board would do in the instant case unless the decision of the Court below is affirmed.

That this Court had, in effect, again passed upon the identical issue raised in the instant case is graphically shown by the following excerpts from the brief for Marion J. Slocum, General Chairman, Lackawanna Division No. 30 of the Telegraphers, which was filed with this Court:

Page

2-3 "The petitioner in this case challenges a judgment of the Court of Appeals of the State of New York which affirmed actions of the lower courts of that State in entertaining jurisdiction to determine a controversy concerning the interpretation of collective bargaining agreements entered into pursuant to the provisions of the Railway Labor Act. * * * One of these agreements was between the respondent and The Order of Railroad Telegraphers, a railroad labor organization national in scope, of which the petitioner is an official; the other agreement was between the respondent and the Brotherhood of Railway and Steamship Clerks, a similar national railroad labor organization. * * *"

3 "The controversy involved a claim by petitioner's organization (Telegraphers) that certain work being performed by crew-callers in respondent's Elmira Yard fell within the scope rule of the telegraphers' agreement. On the other hand, the clerks' organization maintained that all work performed by said crew-callers came within the scope rule of their agreement."

4 "Respondent further alleged that a dispute existed between the telegraphers and the clerks as to whether the work performed by crew-callers came within the scope rules of the respective agreements."

* * *

"Respondent asked for an interpretation of all four agreements with the two organizations involved; as-

serted that its interpretation favored the clerks' organization; and requested the court to declare that all work performed by crew-callers came within the scope rule of the clerks' agreement."

4-5 "Respondent further alleged, upon information and belief, that if it recognized the claim of the telegraphers it would be subjected to a claim by the clerks who would present the same under the Railway Labor Act to the Third Division of the National Railway Adjustment Board (R. 11). Corresponding allegations were made as to assertion and recognition of a claim by the clerks in which event the telegraphers would present their claim under the Railway Labor Act to the Third Division of the Adjustment Board (R. 12). The basis upon which the respondent relied to sustain jurisdiction of the court to grant declaratory relief is set forth in Paragraph 30 of the complaint, wherein respondent alleged it had no adequate remedy at law, and no adequate remedy before the National Railroad Adjustment Board, since there was no procedure whereby respondent could bring claims jointly before the Third Division or any Division of the Adjustment Board for determinations, or whereby respondent could make both organizations parties thereto, so that both organizations would be bound by any decision of said Third Division (R. 13)."

7-8 "While the action was in form an action to interpret four written agreements, it developed upon the trial that no decision could be made on any such basis. The scope rule of none of the agreements defined the duties of the positions listed therein, and no court could possibly have interpreted these agreements to determine the controversy. It thus appeared that the true nature of the controversy was that of a jurisdictional dispute, *i. e.*, a dispute between two labor organizations as to the representation of particular employees performing a variety of duties mixed in nature. It was clearly demonstrated that substantial clerical duties were performed by these employees (R. 92, 106). On the other hand, it was shown by an overwhelming volume of testimony that the telegraphers had his-

torically represented all employees engaged in any form of communications work, even though the same employees performed incidental clerical work (R. 44), and it was not seriously disputed that a large portion of the crew-clerks' work was in this field (R. 72, *et seq.*)."

In his specification of errors, Slocum said:

12 "5. The Court of Appeals erred in its judgment that the procedure under the Railway Labor Act was inadequate to bind all of the parties."

In the summary of argument, it was stated:

13-14 "The administrative remedy, provided by federal statute, was specifically designed to resolve disputes such as the one here presented. * * *"

16 "It is important to note that a single Division, viz., the Third Division, has jurisdiction over both telegraphers and clerical employees * * *."

16 "The Act [45 USC, Section 153 First (i)] thus specifies a complete procedure for the handling of claims of this type."

29 "The present controversy is almost a prototype of the kind of case that is heard by the Railroad Adjustment Board every day. This tribunal is recognized by carriers and labor unions alike as the appropriate forum for the prompt and expert settlement of such controversies."

31 "The Railroad Adjustment Board is made up exclusively of practical railroad men drawn equally from management and labor. These men are informed by experience and have a complete familiarity with such controversies, which they hear every day."

In the concluding paragraph, Slocum said:

37 "This Court has found in the Act a wise rule of policy which remands carriers and labor organizations alike to the statutory procedures for the settlement of railroad labor controversies. No reason appears why this salutary rule, clearly stated in the *Pitney* case, should not be applied to proceedings in state and federal courts alike."

A clear and concise expression of the law on this point is also found in *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302. The subject matter of that suit was a series of awards involving the same work which had been rendered by the Board in separate proceedings filed first by the Clerks and then by the Telegraphers. The carrier took the position, as here, that binding and conclusive awards could be rendered only if notice had been given to all whose right might be affected. There, as here, the Board ignored the carrier's position and gave notice of hearing only to the organization filing the claim and the carrier against whom it was filed. In the Clerks' proceeding, the Board, with a referee sitting, found the Clerks' claims to be valid and ordered the work in question assigned to the Clerks. Some time later, in another and different proceeding, and with a different referee sitting, the Board sustained the claims of the Telegraphers to the same work involved in the previous Clerks' awards. In holding that it was the duty of the Board in the Telegraphers' cases to give notice to the Clerks and all employees involved, and in the Clerks' cases to give notice to the Telegraphers and all employees involved, and that the *carrier was entitled* in each case to have those duties performed, the Court of Appeals said (pp. 305-306):

> "The dilemma here posed results in large part from the refusal of the Board to bring both groups of claimants before it in one proceeding. Judging from a number of opinions accompanying awards and orders which were introduced as evidence in this cause, it appears to have been generally assumed that the Board has no authority under the Act to consider two agreements simultaneously, each in the light of the other. * * * We think logic and reason support the carrier's construction of § 3, First (j) which provides that the Board shall give due notice of all hearings 'to the employee or employees and the carrier or carriers in-

volved in any disputes submitted to them.' We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employees.

"Obviously it is desirable to settle controversies such as these involving so-called 'overlapping contracts' on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by § 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier. And we think the case, *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318, supports this view. That case also involved a dispute between two groups of employees, both of whom claimed the same jobs by virtue of the agreement of each with the carrier. There the Supreme Court upheld the function of the Adjustment Board to resolve the conflict, but indicated that in doing so, the Board must consider both agreements together, stating 326 U. S. at page 567, 66 S. Ct. at page 325, 'O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood'."

Petitioners urge (p. 22) that the holding of the lower Court "has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the carrier makes the contention that notice to others than the claimant and the carrier is required."

In view of this startling indictment, we feel certain that this Court will be quite interested to know that the Telegraphers themselves sought to participate in the Clerks'

claims which were involved in the case of *Missouri-Kansas-Texas R. Co. v. N. R. A. B.*, N. D. Ill. (1954), 26 Labor Cases, ¶ 68,671 (copied in full in Appendix) and we believe this Court will also be interested to read the following finding made by the District Court for the Northern District of Illinois on September 2, 1954, in support of its mandatory permanent injunction ordering the Board to give the kind of notice which the *Pitney* and *Slocum* cases say it is the duty of the Board to give:

> "66. By letter dated November 29, 1943, V. O. Gardner, President of ORT, informed the Board that certain employees of MKT represented by ORT were involved in the dispute filed with the Board by BRC; that those employees had expressed themselves as being materially affected by the outcome of that dispute; that they had signified a desire to present their interest before the Board when hearings were held or other adjudicatory action was taken on BRC's claim; that said employees desired to be represented before the Board by ORT, through its duly accredited officers or agents; that there were parties other than the claimant and MKT who were interested and involved in the dispute and who would be affected by an award; and Gardner expressed a desire to be notified promptly of any action by the Board so that ample opportunity would be afforded such employees or their representatives to participate in any hearings or deliberations which might be conducted by the Board.
>
> "Gardner enclosed with his letter of November 29, 1943, separate letters dated November 20, 1943, each addressed to the Board by G. M. Singletary, J. C. Parks, and E. Dowdy, who held the positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk, respectively, for MKT at Altus, Oklahoma. Each of those letters quoted BRC's claim, as set forth in Finding 65, then pending before the Board, and each letter concluded with the following three paragraphs:
>
> > 'I am involved in this dispute for the reason that I am one of the employees referred to in the above

claim, and I consider that my interests and rights will be adversely affected and placed in jeopardy if this claim should be sustained.

'I therefore respectfully request a hearing as provided for by the Railway Labor Act, which procedure is in accord with an opinion given on the subject by the Attorney General of the United States.

'Being unable to appear in person before your Division, I hereby authorize The Order of Railroad Telegraphers, its officers or agents, to act as my duly accredited representative at any or all hearings on said claim. I delegate to The Order of Railroad Telegraphers full authority to appear thereat as my counsel and file briefs in my behalf.' " (Appendix p. 23.)

It was only after the Telegraphers and the Clerks agreed between themselves that each organization should bring individual claims against a carrier so that each might obtain a favorable award without notice being given to the other, that the Telegraphers advanced the argument presented in their brief. This is shown by finding 64 in the Missouri-Kansas-Texas Case (68 Labor Cases ¶ 68,671):

"ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board procedure and joining BRC and other labor organizations in the following agreement:

'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event

> the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decision of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'
>
> "This was the same procedural program previously advocated by BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board." (Appendix p. 21.)

Contrary to Petitioners' argument, it is the Board itself which is frustrating the operation of the Railway Labor Act by its failure to serve the notice required by the statute. This subject is discussed more at length at pp. 65-67. The following language of this Court in *Order of Conductors* v. *Swan,* 329 U. S. 520, 524, is particularly applicable to the Board's failure to comply with the statute in this case:

> "We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by § 3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation."

Petitioners further state that prior to the decision below in this case, when the labor members and the carrier members of the Board deadlocked on a carrier contention that notice was required to other than the claimants and the carriers, a referee was appointed pursuant to Section 3 First (l) of the Railway Labor Act to sit with the Board as a member and decide the case (Br. 22) and that if referees were able to resolve such disputes the courts should not interfere (Br. 23). Petitioners cite numerous awards which they claim support their contention that referees have been appointed to decide the notice question. A detailed examination of those awards reveals, however, that in all of the awards cited, a referee was appointed by the National Mediation Board to decide the dispute on the merits alone.

In any event such claims before the Board were only resolved by creating additional disputes. The legislative history of the Railway Labor Act shows a consistent purpose to establish and maintain a system for the peaceful and final adjustment of disputes. It is inconceivable, in view of the stated purposes of the Act [45 U. S. C. 151a (4), (5)], that Congress intended the Board should settle one dispute by creating another. The Telegraphers organization itself has expressed this view through W. C. Thompson, its General Chairman on the M-K-T Lines, as shown by finding 127 in *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, N. D. Ill. (1954), 26 Labor Cases, ¶ 68,671 (Appendix, p. 44). That finding incorporates excerpts from a letter written by Mr. Thompson, the second quoted paragraph of which reads in part:

> "I am certain that Mr. Douglas, the referee [in awards 3932, 3933 and 3934], or any member of the Board, cannot and will not say that Congress in enacting the Labor Act, intended to create another dispute

through the National Railroad Adjustment Board in disposing of one and that is what Awards 3932, 3933, and 3934 actually accomplish."

The manner in which the Board's interpretation and application of the Act has worked is graphically shown by the history of Awards 3932, 3933 and 3934 cited in Petitioners' brief (p. 22). The claim involved in Award 3932 was first presented to the Board on October 11, 1943 and resulted in Award 2597. The claims involved in Awards 3933 and 3934 were first presented to the Board on June 29, 1944 and resulted in Awards 2650 and 2651. These claims, filed by the Clerks, asked the Board to order the Missouri-Kansas-Texas Railroad Company to transfer certain work done by telegraphers to clerks and to compensate the clerks for money losses. The telegraphers and three individual members of the telegraphers requested the Board to give them notice of the hearing and an opportunity to be heard in the proceeding which resulted in Award 2597. The Board "deadlocked on the issue of giving notice to persons or organizations, other than parties to the disputes [claimant union and carrier], whose interest may be affected by awards on the merits." The carrier members took "the position that binding and conclusive awards can be rendered only after notice [is] given to all whose rights may be involved." The Board, with referee Bruce Blake sitting as a member, on March 16, 1944, decided that the case should be set down for hearing on the merits, without notice to anyone except those parties named in the dispute (claimant union and carrier). Accordingly, notice of the hearing was given to the Clerks and M-K-T, but no notice was given to the Telegraphers and the three individual members. After a hearing on the merits the Board, with referee Bruce Blake sitting as a member, on June 1, 1944, rendered Award 2597. The

Board adhered to its former decision that notice of hearing should be given only to parties named in the dispute [Clerks and M-K-T] but the Board in accordance with its decision in Award 2596 dismissed the case without prejudice because: (1) The Telegraphers had a vital interest in the outcome of the dispute, (2) to sustain the claim would deprive the Telegraphers and their members of most substantial and valuable rights, and (3) to deprive them of such rights without giving them an opportunity to be heard would be subversive of democratic principles and processes.

On July 31, 1944, the Clerks requested the Board's permission to withdraw the other two cases. This permission was granted and on August 2, 1944 those cases were dismissed by Awards 2650 and 2651.

On April 17, 1947, the Clerks submitted to the Board the identical claims covered by previous Awards 2597, 2650 and 2651. In its submissions to the Board in each of those claims, M-K-T called the Board's attention to the previous awards, to the reasons given by the Board for dismissing the claim covered by Award 2597, and called the Board's attention to the absence of the Telegraphers, in these words:

> "This claim * * * has not made and does not contemplate making The Order of Railroad Telegraphers a party to the action, but rather seeks to exclude that organization.
>
> "No notice is given to a party to be affected. No opportunity is given such party to be heard and present every available defense."

Despite the position of M-K-T that notice should be given to the Telegraphers, the Board gave notice of the hearings only to the Clerks and M-K-T.

On June 10, 1948, the Board, with referee James A. Douglas sitting as a member thereof, rendered Awards

3932, 3933 and 3934 sustaining the claims of the clerks, except for the demand for money losses.

These awards and the disputes underlying them are still in litigation, with resulting unrest among those employees of M-K-T who are represented by the Clerks and Telegraphers. *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, D. C. N. D. Ill. (1954), 26 Labor Cases ¶ 68,671, Findings 65-104, 163, Appendix pp. 22-37, 58.

Another example of how the Board's interpretation and application of the Act has "worked" is shown by the history of the claims filed over 15 years ago by trainmen on the Santa Fe in which they alleged the right (under their agreement) to do work which was being performed by "express messengers" of the Railway Express Agency. In 1942, without giving any notice to those messengers and without their being heard before the Board, five awards (Nos. 6635-6639) were rendered sustaining the claims. In 1944 the railroad made a supplemental agreement with the trainmen implementing the awards, took the messengers off the trains and put the trainmen on to do all the work which the displaced messengers once handled. In 1949 the District Court for the Western District of Missouri set the awards aside and declared the supplemental agreement void. The decision was affirmed by the Eighth Circuit (1950). This Court denied certiorari and denied rehearing. In 1954 the five dockets of the Board were ordered reopened, pursuant to mandate in accordance with the decision of the Seventh Circuit in *Brotherhood of Railroad Trainmen* v. *Swan*, 214 F. (2d) 56. Such action, now being taken, could have been effected in 1939 when the Board docketed the claims, by the simple expedient of following the requirements of the Act.

Still another example of how the Board's interpretation of the notice requirement "works" is the claim filed in 1939 by trainmen on the Santa Fe railroad for the right

to do "head-end" work. The Board heard the claim without notifying or hearing the train porters who were, and for many years had been, doing that work. The Board issued an award (No. 6640) sustaining the claim. That award has been held void for want of due notice under Section 3 First (j) of the Railway Labor Act. The case has been before the Seventh Circuit twice and is now back on the trial court's docket.

Thus, it can not be seriously contended that the Board's interpretation and application of the Act has "worked" in view of the fact that claims and their underlying disputes remain unresolved twelve and fifteen years after their original submission, all because of the labor members' and collective bargaining representatives' refusal to follow Section 3 First (j).

Petitioners further urge that if the administrative process in this type of case is to function as intended, with the courts not deciding issues presented to the Board—at least until after the Board has decided them, the decision of the lower court should be reversed (Br. 24). This argument again emphasizes the persistent and consistent refusal of Petitioners to recognize the true nature of this case and to deal with it accordingly. Their purpose is clear. They wish to divert the Court's attention from the primary relief sought by Illinois Central, namely, a judgment requiring the Board to comply with Section 3 First (j) of the Railway Labor Act, *i. e.*, to give the Clerks and all employees involved due and timely notice of the hearing on the claim instituted by the Telegraphers. The Court is not called upon to decide the "issues presented to the Board". It is merely called upon to require the Board to proceed in such a way that the Board's decision of the issues will be valid. Only in this way can there be a final settlement of the dispute. Instead of circumventing the Railway Labor Act, Illinois Central is asking this Court to compel the Board to obey that statute in accordance with

the decisions of this Court in the *Pitney* and *Slocum* cases. The objective of Illinois Central is inside—not outside—the law. It seeks the rights which the Railway Labor Act affords it and it asks the Court to compel the Board to obey the mandate of Congress.

IV.

"ACTUAL NOTICE" DOES NOT MEET THE REQUIREMENTS OF DUE PROCESS IN VIEW OF THE FACT THAT BOARD DOES NOT PERMIT PERSONS HAVING "ACTUAL NOTICE" TO PARTICIPATE IN PROCEEDINGS BEFORE THE BOARD.

Telegraphers argue (Br. 38-41) that actual notice of the proceeding before the Board is sufficient. This argument, however, loses all force in view of the facts: (1) there is no showing in the record that Shears, the employee doing the work claimed by the Telegraphers, has actual notice of the proceeding before the Board (R. 37); (2) the record shows that Shears, even if he had "actual notice" would not be permitted to appear and participate in the hearing before the Board (R. 25-26); and (3) the record shows that the Clerks, the union representing Shears, would not be permitted to appear and participate in the hearing before the Board (R. 25-26).

Petitioners' statement that "we know from the record that the Clerks do not desire to appear" (Br. 40) is not warranted from the facts of record. Furthermore, whether the Clerks "desire to appear" is immaterial. The statute requires that notice be given to employees and their unions involved in disputes before the Board. This must be done whether those employees and unions desire to appear or not, in order that the Board may render valid and binding awards. Clearly, the Clerks are "involved" in the proceeding before the Board, as a matter of law. The purpose of the notice required by the Act is to assure

the guarantee of due process of law to the carrier, to each employee, and each union involved in a dispute before the Board. This means that each essential element must be present: that is, notice, opportunity to be heard or defend, a competent tribunal and an orderly proceeding in accordance with established rules which do not violate fundamental rights. *16 C. J. S., Constitutional Law, Sec. 569 (2), pp. 1153-1155.*

In support of their argument that actual notice is sufficient, Petitioners cite (Br. 38): *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. 2d 768; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. 2d 294, certiorari denied 342 U. S. 819; and *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793. Those cases were decided before it was established that the Board will only hear persons who have received formal notice from it (R. 25-26, 38). Moreover, in those cases the courts recognized that those receiving actual notice should be allowed to participate in the proceeding and assumed that such persons would be afforded that right by the Board.[3] For example, in the *Kirby* case the Court stated (188 F. 2d 798) that employees involved "are entitled to notice and an opportunity to be heard before the Adjustment Board." Similar statements are found in the *Estes* case (89 F. 2d 768, 770, 771) and the *Hunter* case (188 F. 2d 294, 301).

The purpose of notice is not only to afford "involved" persons an opportunity to participate in a proceeding should they so desire, but is also to protect the constitu-

3. See also: *Elgin J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 736, 746; *Elgin, J. & E. R. Co.* v. *Burley*, 327 U. S. 661, 662, 666; *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. 2d 481, 484, certiorari denied, 300 U. S. 673; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302, 306; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1948), 171 F. 2d 594, 598, certiorari denied, 337 U. S. 916.

tional rights of the carrier, to make certain there is due process of law in the Board's proceedings, to protect all employees and unions involved in disputes, and to insure that an award when finally entered, after prolonged and expensive litigation, will be a valid award upon which all interested parties may rely for protection. Accordingly, it is apparent Illinois Central is entitled to have the Board give notice and an opportunity to appear to D. A. Shears and the Clerks. *67 C. J. S., Parties, Sec. 74, c(1), pp. 1027-1028.*

Only recently have the courts been informed that the Board, with conscious indifference and complete disregard for the numerous decisions of the federal courts, has effectuated a custom and practice of denying persons having "actual notice" the right to participate in proceedings before it. One of the first cases to consider this question was *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. 2d 32. In that case, the Court held the "actual notice" rule should be abandoned in view of such policy of the Board. In this connection, the Court said (pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second *Hunter* case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for sufficient period prior thereto to permit plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped

> from relying on the Board's failure to serve forma notice thereof upon him.'
>
> "Although we indicated in that opinion that actua notice of the hearing for a sufficient period prior there to to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them noth ing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

Similarly, in dealing with that question in this case, the Court below said (R. 55):

> "Of more importance, however, is the fact tha actual notice would have served no purpose insofa as it afforded protection to the Clerks or Shears o either their statutory or constitutional right to be heard because, as the record plainly shows, the Board would not have permitted them to be heard with tha kind of notice. A hearing would have been allowed only to those receiving formal notice. Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard.' 212 F. (2d) 29.

These later decisions are bottomed on principles which are the foundation of our form of government. An award and order made under circumstances where employees and their unions are adversely affected and have not been accorded an opportunity to participate in a hearing, even though they had received "actual notice" of the proceeding, is a denial of due process of law, for the fundamental requisite of due process of law is the opportunity to be heard. *In re Central Railroad Co. of New Jersey*, C. A. 3 (1942), 136 F. 2d 633, 639, certiorari denied 320 U. S. 805; *Grannis* v. *Ordean*, 234 U. S. 385, 394; *N. Y.* v. *New York N. H. & H. R. Co.*, 344 U. S. 293, 297; *Merrill on Notice*, 1st Edition (1952), Volume 1, Chap. 11, Sec. 512, page 498

V.

THE DISTRICT COURT PROPERLY TOOK JURISDICTION OF THE PROCEEDING.

Petitioners misconceive the nature of this action; hence their propositions, arguments and authorities have no bearing upon the real issue in this case. Petitioners have devoted a large part of their brief to a challenge to the jurisdiction of the District Court (Br. 9-21). As subdivisions under this section of their argument, Petitioners assert that the District Court does not have jurisdiction because the railroad has not exhausted its administrative remedies (Br. 9-13); that the action is premature because the Board's decision might be in accord with the railroad's contentions (Br. 13-16); and that the District Court lacks jurisdiction of the subject-matter because the judicial remedy specified by the Railway Labor Act for challenging the validity of an award is exclusive (Br. 16-21).

Throughout these sections of their arguments and, in fact, throughout their entire brief, Petitioners persistently refuse to recognize the true nature of this case. Petitioners labor to impress this Court with the erroneous assumption that the action of the Court below was an interference with the valid process of the Board and that, in effect, the District Court has substituted its judgment for that of the Board in connection with the subject matter of the claim pending before the Board. Such assumption is completely without merit. All that Illinois Central is seeking is to have notice served in accordance with the requirements of Section 3 First (j) of the Railway Labor Act [45 U. S. C. Section 153 First (j)] and the decisions of the federal courts[4] in order that the Board may issue a valid award.

4. See: *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. (2d) 302; *Hunter* v. *Atchi-*

A. Exhaustion of Administrative Remedies Rule Is Inapplicable Where, as Here, Defect Urged Goes to the Jurisdiction of the Administrative Agency.

The contention that the District Court lacks jurisdiction because Illinois Central has not exhausted its administrative remedies (Br. 9-13) is not well-founded. Illinois Central is not attempting to have the Court review preliminary and procedural matters which are discretionary with the Board, but rather is attempting to compel the Board to comply with substantive and mandatory provisions of the Railway Labor Act. Petitioners cite as authority for their assertion that judicial intervention is not warranted at this time: *Ashcraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Myers* v. *Bethlehem Ship Building Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Jonco Aircraft Corp* v. *Franklin*, 346 U. S. 11; and other cases in which the complainants attempted to stay a determination by the governmental agency involved. Illinois Central is not attempting to stay the ultimate determination of the merits of this case by the Board. It is attempting to require the Board to follow the mandate of Congress in order that the Board's jurisdiction may be retained, and a valid and binding award issued which will give Illinois Central and all employees and unions involved in the dispute before the Board the protection to which they are entitled. That compliance with

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son; *Topeka & Santa Fe R. Co.*, C. A. 7 (1951), 188 F. (2d) 294, cert. den., 342 U. S. 819; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. (2d) 527; cert. den., 340 U. S. 832; *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. (2d) 32; *Nord* v. *Griffin*, 86 F. 2d 481, cert. den., 300 U. S. 673; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, 171 F. 2d 594, cert. den., 337 U. S. 916; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793.

jurisdictional requirements is not a preliminary and procedural matter, within the meaning of the rule requiring that administrative remedies first be exhausted before resort is had to the courts, is clearly shown by the language of this Court in *Kansas City So. Ry.* v. *Interstate Commerce Commission*, 252 U. S. 178. In that case the Interstate Commerce Commission had refused to make certain valuations required by the Interstate Commerce Act on the ground that compliance with the statute involved consideration by the Commission of matters beyond the possibility of rational determination and called for inadmissible assumptions. Suit was brought to compel the Commission to hear proof as to the valuation required and to act upon it. The Court stated the issue as follows (p. 187):

> "* * * the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command."

This is exactly the issue in the instant case. Section 3 First (j) directly and expressly requires that notice be served upon all employees involved in a proceeding before the Board. The Board has unequivocally refused to obey such command. In the *Kansas City* case, the Court in resolving the issue said (p. 188):

> "Finally, even, if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of the opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent

thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

The case of *Skinner & Eddy* v. *United States*, 249 U. S. 557, is also pertinent. In that case the Government contended that the District Court did not have jurisdiction to grant relief from an Interstate Commerce Commission rate increase because the plaintiff had not exhausted its remedies before the Commission. In holding that the District Court properly assumed jurisdiction, this Court, by Mr. Justice Brandeis, stated (pp. 562-563):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry. Co.* v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. The *Sacramento* Case, *supra*, was a case of this character. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit."

The case of *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, is also in point. It involved the question whether Alaska is a territory of the United States within the meaning of the Interstate Commerce Act so as to permit a Steamship Company to institute an action before the Interstate Commerce Commission alleging violations of the Act by a railway operating in Alaska. The Commission resolved the question in the

negative and dismissed the petition of the Humboldt Company. Suit was then brought in the Supreme Court of the District of Columbia praying for a writ of mandamus against the Commission to require it to take jurisdiction, which proceeding was dismissed. The Court of Appeals reversed and remanded with directions to issue a peremptory writ of mandamus requiring the Commission to take jurisdiction. On appeal, this Court said (p. 484):

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex Parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed?"

The same question presents itself in this proceeding. If the Board nullifies its duties by rendering an award which is void for lack of jurisdiction or want of due process, how can the carrier involved review such action? The answer of the Telegraphers is that the carrier must wait until the party in whose favor the award is rendered at-

tempts to enforce it through the courts. This, however, completely overlooks the fact that in many cases the organizations in whose favor the awards are rendered do not attempt to enforce the awards through the courts, but instead enforce them through the use of their economic strength, *i.e.*, strike threats [Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, p. 23, lines 8-10; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, D. C. N. D. Ill. (1954) 26 Labor Cases ¶68,671, Finding 111], thereby eliminating any possibility of judicial review by the carrier. Inasmuch as there is no provision in the Railway Labor Act which affords a carrier a review of an award of the Board as a matter of right, Illinois Central is entitled to relief against the deliberate refusal of the Board to give the notice required by Section 3 First (j) of the Act, for its very purpose as defined by the Act is to render an award that is valid. Moreover, under such circumstances the courts cannot be said to be without the power to require the Board to comply with the command of Congress. *Wilbur* v. *United States*, 281 U. S. 206.

The federal courts have, on numerous other occasions, recognized that the rule requiring the exhaustion of administrative remedies is not iron-clad and has no application where the defect urged goes to the jurisdiction of the administrative agency. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638; *United States ex rel. De Lucia* v. *O'Donovan*, C. A. 7 (1950), 178 F. 2d 876, cert. den., 340 U. S. 866.

B. The Action Is Not Premature.

Petitioners further urge that there is no case or controversy because the Board's decision may be in accord with the railroad's position (Br. 13-16). There is no merit in this contention whatsoever. Section 3 First (j) of the Rail-

way Labor Act requires the Board to serve notice upon employees and their unions involved in disputes before it. The Board has refused to follow this mandate of the statute (R. 19-20, 29, 37). As previously pointed out (pp. 52-56), where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus. The very fact that the Board has refused to comply with the statute and that such refusal is a denial of Illinois Central's right to have the contract of the Telegraphers construed in the light of the Clerks' agreement and with due regard to the usage, practice and custom, in itself proves a case or controversy requiring the exercise of judicial power. Vom Bauer's Federal Administrative Law, Volume 2, Section 698, p. 673.

This Court spelled out the meaning of a "case or controversy" in *In Re Summers*, 325 U. S. 561, as follows (pp. 566-567):

> "A case arises, within the meaning of the Constitution when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it'. * * * A declaration on rights as they stand must be sought, not on rights which may arise in the future, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Fairchild* v. *Hughes*, 258 U. S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259."

The instant case meets each of these requirements. Judicial power is capable of acting with respect to the Railway Labor Act and indeed is required if the mandate of Congress is to be followed. Illinois Central seeks a declaration on rights as they stand. The Board has not given the notice required although requested to do so (R. 19-20, 29, 37) and there is an actual controversy over the issue.

The cases cited by Petitioners (Br. 14) that administrative proceedings may not be enjoined have no application. Illinois Central is not attempting to enjoin this proceeding but is merely attempting to require the Board to comply with the statute so that a valid award may be issued (R. 56).

C. Enforcement Suit Under Section 3 First (p) of the Railway Labor Act Is Neither an Exclusive Nor an Adequate Remedy.

Petitioners claim (Br. 17-21) that when the Board fails to give due notice the only remedy available to the carrier is to defend an enforcement suit under Section 3 First (p) of the Railway Labor Act [45 U. S. C. Section 153 (p)]. This argument is completely beside the point because no award has been rendered. The sole purpose of this case is to secure the service of the notice required by Section 3 First (j) of the Act so that a valid award can be rendered.

In *Miguel* v. *McCarl*, 291 U. S. 442, this Court had occasion to consider a contention similar to that advanced by Petitioners herein. In that case the petitioner sought to require the payment of allowances due as retirement pay from the Army. One of the defenses to the action was that the petitioner in that case had a remedy at law in the Court of Claims for his retirement pay. The Court

first disposed of the right to a mandamus action as follows (p. 454):

> "In this situation the duty * * * 'is so plainly prescribed as to be free from doubt and equivalent to a positive command,' and, therefore, is 'so far ministerial that its performance may be compelled by mandamus.'"

And with respect to the contention that there was an adequate remedy at law, this Court said (p. 455):

> "We find no merit in the contention * * * that the suit cannot be maintained because petitioner has a remedy at law in the court of claims for his retired pay. *Smith* v. *Jackson*, 246 U. S. 388; 241 Fed. 747, 760."

In any event, Petitioners' contention that an enforcement suit provides an adequate remedy is without foundation in fact. Defending an enforcement suit would not result in the serving of notice but would merely invalidate the award. *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, 534; *Kirby* v. *Pennsylvania R. Co.*, C. A. 3 (1951), 188 F. 2d 793, 799. Thus, the basic controversy would remain undetermined after a great expenditure of money, time and effort. Moreover, there would be no way in which the mandate of Congress could be enforced for the Board has persisted and continues to persist in its refusal to serve the requisite notice (R. 19-20, 25-26, 29, 37). Inasmuch as the Telegraphers are "Petitioners" in the proceeding before the Board, Illinois Central would have no opportunity for review of an award unless and until a proceeding was brought by the Telegraphers to enforce such award. [45 U. S. C. 153 First (p)]. However, labor organizations have often foregone "judicial enforcement" of an award, whereby the carrier may obtain court review, in favor of "economic enforcement," whereby the carrier has no opportunity for court review. See, *e. g.*,

Finding 111, append. 40, in *Missouri-Kansas-Texas R.* Paragraph 68,671, Nineteenth Annual Report of the National Mediation Board for the year ended June 30, 1953, page 23, lines 8-10.

Furthermore, if Illinois Central is before the Board with only the Telegraphers, a referee will decide that claim. If such an award is adverse to Illinois Central and it complies therewith, an additional dispute is thereby created with the Clerks. A claim of the Clerks will then be presented to the Board with only the Clerks and Illinois Central before it and that claim would be decided by a different referee. Thus, at no time would a single referee have the benefit of the evidence and argument of Illinois Central and all employees and unions involved in the dispute, as this Court intended by its decisions in the *Pitney* and *Slocum* cases.

If the Board renders an award in favor of the Telegraphers and the Telegraphers sue on that award, Illinois Central would not be permitted to implead the Clerks. Conversely, if the Board renders an award in favor of the Clerks and the Clerks sue on that award, Illinois Central would not be permitted to implead the Telegraphers. See *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, 26 Labor Cases ¶ 68,671, Finding 165, append. 58. Thus, the Court in the enforcement actions would not have before it all of the parties to the dispute and would never have presented to it by the respective parties all of the facts relating to such dispute as it was contemplated should be done in the *Pitney* and *Slocum* cases.

Accordingly, if mandamus is not available to Illinois Central, it, in effect, has no remedy.

Telegraphers' claim before the Board seeks, among other things, back wages from the date of the alleged violation of their agreement. A final award on the present record would be void due to the failure of the Board to comply with Section 3 First (j) of the Railway

Labor Act, but if there is merit in the Telegraphers' claim, the wilful failure of the Board to follow the jurisdictional mandate of the statute will delay the ultimate decision and the period during which Illinois Central is subjected to the possible obligation of double payments for one position. This period could be further prolonged by the failure of the Telegraphers to seek enforcement of a subsequent valid award for a two-year period after its entry as provided by Section 3 First (q) of the Act [45 U. S. C. Section 153 First (q)].

In the event the Board proceeded on the present state of the record and rendered an award adverse to Illinois Central, the carrier would be obliged, at its peril, either to comply with the award and displace Shears or to continue Shears in his position in defiance of said award and refuse to employ a member of the Telegraphers, either of which courses would be certain to result in litigation by the employee refused employment, and a void award would afford absolutely no protection as against such multifarious litigation. Or, again, the Telegraphers might avoid attempting to enforce such an award through the courts and resort to enforcement by economic strength, thereby denying plaintiff any right to review.

Illinois Central has already been advised in writing by the Clerks that that organization considers the work in question to be properly within the scope of their agreement and that the Clerks will prosecute a claim for said work before the Board in the event Illinois Central gives the work to the Telegraphers (R. 30-31) pursuant to an award in favor of that organization. This fact was made known to the Board (R. 18) but in spite of such knowledge it persists in its refusal to serve the required notice. Under these conditions and irrespective of the validity of any award of the Board concerning the work at Palestine, Illinois Central is faced with additional, vexatious, costly and independent

claims by a separate and distinct organization and employee for the same work, losses of compensation and employment, and with suits for enforcement of such awards as may be obtained. This could and should be avoided if the Board gives formal notice as required by statute and permits all employees and unions involved in the dispute to participate in the proceedings before the Board. *Order of Conductors* v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. 2d 302.

The Court below recognized these facts for it stated (R. 54-55):

> "We conclude that the court had jurisdiction and that the action was not premature. Closely aligned with these issues and partly covered by our discussion relative thereto is the contention that in any event the Carrier has no standing to institute such an action because it has shown no harm or damage and may never be able to do so, depending upon the decision which the Board makes on the merits. We think this contention is without merit. The Carrier has been involuntarily brought into the proceeding by action of the Board. In order to protect its rights and property, it must resist the Telegraphers' claim by participating in the proceeding. To do so it must expend time, labor and money in a fruitless effort to protect itself from a potential award rendered in a proceeding in which the Board is without jurisdiction. Moreover, the Carrier is threatened not only with an abortive proceeding [by the Telegraphers] before the Board but [also one] by the Clerks in an action concerning the same employment rights."

We earnestly submit that it is completely illogical to argue that Illinois Central will not be damaged if the Board, on the present record, proceeds to enter an award which is neither final, binding nor enforceable.

Petitioners state (Br. 16) that "it is, of course, the normal rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive." Illinois Central does not question this principle of law, but it does not mean that if the Board refuses to follow the procedure prescribed by Congress the courts cannot compel it to do so.

It is absurd to argue that although Congress has specified a ministerial duty as here, there is no way to enforce compliance. Certainly no inference can be drawn from the cases cited by Petitioners. In the cases of *Washington Terminal Co.* v. *Boswell*, D. C. Circuit (1941), 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732; and *N. O. Public Belt R. Com.* v. *Ward*, 182 F. 2d 564 (Br. 17-19), the complainants sought a judicial review of awards on the merits. The case of *General Committee* v. *M-K-T Railroad*, 320 U. S. 323 (Br. 17-18), involved a dispute concerning the authority of two Railroad Brotherhoods to represent a certain group of employees. The Court held that such a dispute had to be referred to the Mediation Board. No such question is presented in this case nor is Illinois Central seeking a judicial review of an award as in the *Boswell* and *Ward* cases. Illinois Central is only seeking to require the Board to comply with the mandate of the statute. This Court has, on numerous occasions, held that the federal courts have jurisdiction to enforce the commands of the Railway Labor Act. *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 192; *Graham* v. *Brotherhood*, 338 U. S. 232.

VI.

JUDICIAL ACTION IS REQUIRED.

Judicial action is necessary in this case for the reasons pointed out in *Order of Conductors* v. *Pitney*, 326 U. S. 561.[5] In that case this Court was called upon "to consider to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents in view of the provisions of the Railway Labor Act, 45 U. S. C., Sec. 151 *et seq.*, giving such power to the administrative agencies established thereunder" (p. 562). The facts were thus stated by the Court:

> "Each union claims that its respective collective bargaining agreement entitles it to supply conductors for five daily freight trains operated within the Elizabethport, New Jersey, yards of the railroad and both pressed their contentions on the reorganization trustees appointed under the provisions of Sec. 77 of the Bankruptcy Act. 11 U. S. C. Sec. 205. The two unions are the Order of Railway Conductors (O. R. C.), which represents road conductors who ordinarily operate trains outside the yards, and the Brotherhood of Railroad Trainmen (B. R. T.), which represents yard conductors who ordinarily operate trains inside the yards. But here, the practice over a period of years had been that at times yard conductors manned some trains outside the yard and road conductors manned some trains within the yard, including the five freight trains here involved. In 1940 the railroad in response to pressure by the O. R. C. agreed that thereafter only road conductors would man the outside trains. However, O. R. C. conductors continued to operate the five daily freight trains within the

5. Followed and reaffirmed in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244.

> yard. In 1943 the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains. Thereupon O. R. C. brought this suit in the reorganization court" (pp. 562-563).

The Supreme Court found that the reorganization court, to settle the dispute, would have to act in the "capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts" (p. 565). This the Court held could not be done because "Congress has specifically provided for a tribunal [National Railroad Adjustment Board] to interpret contracts such as these in order finally to settle a labor dispute" (p. 565). After declaring that the Board is an agency "peculiarly competent to handle the basic question here involved" (p. 566), the Court thus emphasized the duties of the Board, viz.:

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. (Citing cases.) For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood" (pp. 566-567).

The Board has refused to follow this direction in the instant case. It has not given Shears and the Clerks notice and an opportunity to participate in the proceedings instituted by the Telegraphers although that claim is for work presently done by D. A. Shears, a member of the Clerks organization (R. 19-20, 30-31).

In so doing the Board has refused to discharge its duty "to interpret contracts such as these in order finally

to settle a labor dispute," *Pitney* case, 326 U. S. at 565, but, on the contrary, is creating an additional dispute (R. 30-31) and making it impossible for Illinois Central and its affected employees to maintain their respective agreements (Railway Labor Act, Section 2 First) and to effect a prompt and orderly settlement of their disputes as contemplated by the Railway Labor Act [45 U. S. C., Section 151a (5)]. The mere statement of these facts should shock the conscience of a court of equity as it did the court below and bring the case clearly within the exception in the *Pitney* case, 362 U. S. 561, that a court of equity can intervene "where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created to protect the interest of individuals or the public is clearly shown" (p. 566). It is idle to contend that a court of equity is powerless to remedy a situation such as this and that such a court may only invalidate the Board's awards and orders. Such a situation would not only create additional controversies but would also leave the instant controversy as pregnant and the procedure for final relief as futile as before.

Courts can compel the Board to proceed to the performance of its duties as laid down by the mandate of Congress. This Court has frequently exercised its power to order other governmental agencies to obey the law. *Kansas City So. Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, 187-188; *Miguel* v. *McCarl*, 291 U. S. 442; *Interstate Commerce Commission* v. *U. S., ex rel. Los Angeles*, 280 U. S. 52; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474; *Roberts* v. *U. S., ex rel. Valentine*, 176 U. S. 221.

It is true here, just as it was in *Order of Conductors* v. *Swan*, 329 U. S. 529, that we are dealing "with a jurisdictional frustration on an administrative level" (p. 525). The Board is thwarting the objective of the Railway Labor

Act promptly, orderly and finally to settle labor disputes and here, as there, "such an administrative stagnation" (p. 524) may be removed by simply requiring the Board to comply with the statute. That is the relief for which Illinois Central prays and to which it is entitled. The Board should be required to dispose of the questions raised by the Telegraphers' claim in a single proceeding after due notice to all employees and unions involved in the dispute, so that the Telegraphers' agreement and the Clerks' agreement can be considered in the light of each other and in the light of any evidence given by all such employees and unions with respect to the usage, practice and custom under those agreements to the end that the dispute may be "finally" settled. *Order of Conductors* v. *Pitney*, 326 U. S. 561, 565.

There can be no doubt that the refusal of the Board to give due notice of hearings, as provided in Section 3 First (j) of the Act, and its refusal to do what the *Pitney* and *Slocum* cases say should be done, has defeated a basic purpose of Congress and has kept the courts occupied with fruitless litigation for many years at large expense to the employees, to the carriers and to the public. Referees have been appointed at additional public expense to decide claims, but they do not get decided. Instead, disputes remain festering, which is just what Congress wanted to avoid when it put 3 First (j) in the statute.

Since 1937, when this Court denied certiorari in the case of *Nord* v. *Griffin*, 300 U. S. 673, the District Courts and the Courts of Appeal, have urged the Board to give due notice of hearings to the employees, to the bargaining representatives of their craft or class, and to the carriers involved in any dispute referred to the Board. But the Board pays no heed. In spite of opinions of this Court in such cases as *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 and

Graham v. *Brotherhood of Firemen*, 338 U. S. 332, on the duty of fair play for all and from all, the Board, with callous indifference and contemptuous disregard "persists with unabated fervor in its often criticized practice." *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. (2d) 32, 35. This being the situation, it is little wonder that in the present case the court below observed (R. 55):

> "It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation."

We believe that the answer is contained in the findings of Fact and Conclusions of Law which supported the permanent mandatory injunction granted September 13, 1954 in the case which the Missouri-Kansas-Texas Railroad Company brought against the Board, the Telegraphers and the Clerks. Those findings, conclusions and final decree appear in the Appendix hereto, for the convenience of the Court.

The Board has been ignoring the will of Congress and the courts despite the judicial guidance which this Court gave the Board in the *Pitney* and *Slocum* decisions, and despite the requirements of due process, simple justice and common sense, the Board remains a law unto itself. We can only say now is the time and here is the place to change this.

We submit that the right to due notice, which is stated so explicitly in the statute, is for the protection of Illinois Central as well as for the protection of the employees and unions involved in the dispute. The requirement embodies the fundamental right to know and meet all opposing claims in one proceeding and to have the issues and contentions of all opposing parties clearly defined so as to be able to meet them by the introduction of evidence and ar-

gument. This fundamental right is a requisite of due process. The refusal to afford that right is not then an irregularity in practice; it is a vital defect.

CONCLUSION.

For the foregoing reasons, Illinois Central submits that this case should be dismissed or, in the alternative, that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

In the District Court of the United States
For the Eastern Division of the
Northern District of Illinois.

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issouri - Kansas - Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, *Plaintiffs,* *vs.* National Railroad Adjustment Board, *et al.*, *Defendants.*	Civil Action No. 50 C 684.

INDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE.

(As published by Commerce Clearing House, 26 Labor ases ¶ 68,671.)

(Not yet officially reported, ... F. Supp. .....)

Findings of Fact.

1. Plaintiff Missouri-Kansas-Texas Railroad Company ereinafter called "MKT") is a corporation of the State Missouri, with its principal office and place of business the City of St. Louis, Missouri. It owns and operates

lines of railroad in interstate commerce and in intrastate commerce in the States of Missouri, Kansas and Oklahoma.

2. Plaintiff Missouri-Kansas-Texas Railroad Company of Texas (hereinafter called "MKT") is a corporation of the State of Texas, with its principal office and place of business in the City of Dallas, Dallas County, Texas. It owns and operates lines of railroad in interstate commerce and in intrastate commerce in the State of Texas.

3. Defendant National Railroad Adjustment Board (hereinafter called "Board") is an agency of the United States of America, created by Section 3 First of the Railway Labor Act of 1934 (45 U. S. C. A. §153 First), with its headquarters in the City of Chicago, Cook County, Illinois.

4. Defendant Third Division of the National Railroad Adjustment Board (hereinafter called "Board") is an agency of the United States of America, created by Section 3 First (h) of the Railway Labor Act of 1934 (45 U. S. C. A. § 153 First (h)), with its headquarters in the City of Chicago, Cook County, Illinois.

5. Defendants C. P. Dugan, J. E. Kemp, R. M. Butler, W. H. Castle, E. T. Horsley, J. H. Sylvester, Gerald Orndorff, Roger Sarchet, C. R. Barnes, and J. W. Whitehouse, are members of the National Railroad Adjustment Board and members of the Third Division of that Board; they maintain their offices in the City of Chicago, Cook County, Illinois, and reside in one or more of the counties within the Northern District of Illinois. Defendants R. M. Butler, W. H. Castle, E. T. Horsley, C. R. Barnes, and J. W. Whitehouse, were substituted for original defendants R. H. Allison, C. C. Cook, A. H. Jones, A. J. Cunningham and A. R. Ferris, whose tenure of office terminated during these procedings.

6. Defendant Brotherhood of Railway and Steamship

Clerks, Freight Handlers, Express and Station Employes hereinafter called "BRC") is an unincorporated association of clerks and other employees of MKT, and of other railroad companies, and of other employers throughout the United States.

7. BRC has its principal office and place of business in the City of Cincinnati, Hamilton County, Ohio, but it has an office and does business in the City of Chicago, Cook County, Illinois.

8. BRC has submitted itself to the jurisdiction of the Court in this case.

9. BRC is the collective bargaining agent under the Railway Labor Act for the craft or class of employees commonly called "Clerks" on the lines of railroad operated by MKT and on the lines of other railroad companies throughout the United States. In those capacities, BRC makes collective bargaining agreements with MKT and other railroad companies. All members of that craft or class are subject to such agreements.

10. BRC has a special Bureau which selects claims against railroads and progresses them to the Board in order to procure awards which will establish principles and precedents for use by BRC on those railroads and on other railroads in obtaining compliance with similar agreement provisions.

11. Awards 3932, 3933, and 3934, rendered by the Board in Dockets CL-3714, CL-3715, and CL-3716, established the principle that employees represented by BRC have the right to perform station clerical work. BRC will use those awards as precedents.

12. The members of BRC constitute a class; there are more than 200,000 members of that class and they are too numerous to bring them all before the Court; and the

members of that class have a common interest in the facts and law of this case.

13. Defendant G. B. Goble is one of the members of BRC constituting a class. He is also one of seven Vice Grand Presidents of BRC and is a member of its Grand Executive Council which has jurisdiction over the affairs of BRC.

14. Goble maintains an office in the City of Chicago, Cook County, Illinois, and he resides in McHenry County, Illinois.

15. Goble is sued individually, as an officer and managing agent of BRC, as a representative of the Grand Lodge, Subordinate Units, System Boards of Adjustment, District Boards of Adjustment, Terminal Boards of Adjustment and Lodges, of BRC, and as a representative of the members of BRC constituting a class.

16. Over a period of fourteen years prior to his becoming Vice Grand President, Goble represented BRC on the Chicago and North Western Railroad System Board of Adjustment, first as a member, then as Vice General Chairman, then as General Secretary-Treasurer, and then as General Chairman.

17. In 1935, Goble was assigned by the Grand President of BRC to duties of Grand Lodge Representative in the Chicago District. In 1936, the Grand Executive Council of BRC elected him to the position of Vice Grand President. He was elected Vice Grand President of BRC at the Toronto Convention in 1939; at the St. Louis Convention in 1943; at the Cincinnati Convention in 1947; and at the San Francisco Convention in 1951. The delegates to those conventions elected Goble; and they had been elected by

members of BRC Lodges throughout the United States, including the BRC Lodges on MKT.

18. Goble is required by BRC's Constitution to perform such duties as the Grand President of BRC assigns to him, to do all in his power to promote the organization of BRC and advance its welfare, and to consult with and assist BRC's System Boards of Adjustment in securing adjustments of wage and schedule disputes.

19. As required by BRC's Constitution, Goble made full and complete printed reports of his official acts and work to each session of the Grand Lodge Convention of BRC. Those reports and his testimony in this case show:

(a) Since 1936, Goble, as Vice Grand President of BRC, has represented that Organization, on assignments from its Grand President, in controversies on 55 railroads, including:

Atchison, Topeka and Santa Fe
Chicago and Eastern Illinois
Chicago and North Western
Chicago, Burlington and Quincy
Chicago Great Western
Chicago, Milwaukee, St. Paul and Pacific
Chicago, Rock Island and Pacific
Chicago Union Station
Erie
Grand Trunk
Great Northern
Illinois Central
Michigan Central
Minneapolis & St. Louis
Minneapolis, St. Paul & Sault Ste. Marie
New York Central
Pennsylvania
Pere Marquette
St. Louis-San Francisco
Wabash.

(b) Goble performed those duties in Washington, D. C. and at other places such as:

State and City
Illinois: Chicago; Springfield
Iowa: Oelwein
Michigan: Detroit; Escanaba
Minnesota: Duluth; St. Paul
Missouri: St. Louis
Ohio: Cincinnati
Wisconsin: Milwaukee.

(c) Goble's activities, as a member and as Vice Grand President of BRC, covered a variety of subjects affecting BRC, its members, and the class or craft represented by it, including:

(1) Representing BRC in elections to determine the collective bargaining agent for employees, and procuring recognition for BRC in other representation disputes, without the necessity of elections.

(2) Negotiating, revising, interpreting and applying collective bargaining agreements covering wages, rules, and working conditions.

(3) Participating in proceedings of the National Mediation Board relating to controversies between BRC and railroad companies over rules and wages.

(4) Handling claims and grievances arising out of collective bargaining agreements.

(5) Participating in arbitration cases under the Railway Labor Act, and sometimes acting as BRC's arbitrator in disputes with railroad companies over the making or revision of collective bargaining agreements.

(6) Protecting employees displaced by railroad consolidations or affected by the coordination of facilities or the pooling of traffic.

(7) Representing BRC on a committee created for the purpose of providing greater labor representation on a railroad system hospital board, and dealing with problems of hospital administration.

(8) Advising and consulting with officers and members of BRC on all kinds of organization work.

(9) Assisting in the formation of a State Representative Committee for BRC.

(10) Representing BRC, during absences of its Grand President, in conferences and negotiations between the Labor Committee and the Railroad Management Committee, which resulted in the 1941 National Wage Increase for Non-Operating Railroad Employees.

(11) Representing BRC in national wage conferences and mediation proceedings which resulted in the 1945 national wage increases.

(12) Representing BRC in the wage dispute between the Cooperating Railway Labor Organizations and the Short Line Railroads, which was disposed of in accordance with the recommendations made by a Presidential Emergency Board.

(13) Representing BRC in negotiations between the Fourteen Cooperating Standard Railroad Labor Organizations and the Carriers Conference Committee, which resulted in the 1945 amendments to the National Vacation Agreement.

(14) Representing BRC on the National Vacation Committee, which dealt with questions arising under the National Vacation Agreement.

(15) Participating in conferences with representatives of the Railway Express Agency and International Brotherhood of Teamsters, concerning the representation of express drivers in Detroit, Michigan.

(16) Participating in proceedings which extended BRC's agreement to cover additional positions.

(17) Representing BRC in jurisdictional disputes with other organizations, including ORT.

20. Goble is such a member of the BRC class as will fairly insure the adequate representation in this cause of all members of said class.

21. Goble is a person whose relationship to BRC is such that it could reasonably be expected that he would give, and he did give, notice of this action to BRC.

22. Goble is a person whose relationship to BRC is

such that it could be reasonably expected that he would give notice of this action to BRC's Grand Lodge, Subordinate Units, System Boards of Adjustment, District Boards of Adjustment, Terminal Boards of Adjustment, and Lodges.

23. Defendant The Order of Railroad Telegraphers (hereinafter called "ORT") is an unincorporated association of agents, telegraphers, and other employees of MKT and other railroad companies throughout the United States.

24. ORT has its principal office and place of business in the City of St. Louis, Missouri, but it has an office and does business in the City of Chicago, Cook County, Illinois.

25. ORT has submitted itself to the jurisdiction of the Court in this case.

26. ORT is the collective bargaining agent under the Railway Labor Act for the craft or class of employees commonly called "Telegraphers" on the lines of railroad operated by MKT and on the lines of other railroad companies throughout the United States. In those capacities, ORT makes collective bargaining agreements with MKT and with other railroad companies. All members of that craft or class are subject to such agreements.

27. ORT has a special Bureau which selects claims against railroads and progresses them to the Board in order to procure awards which will establish principles and precedents for use by ORT on those railroads and on other railroads in obtaining compliance with similar agreement provisions.

28. Awards 4735 and 5014, rendered by the Board in Dockets TE-4540 and TE-4953, established the principle that employees represented by ORT have the right to perform station clerical work. ORT will use those awards as precedents.

29. The members of ORT constitute a class; there are more than 40,000 members of that class and they are too numerous to bring them all before the Court; and the members of that class have a common interest in the facts and law of this case.

30. Defendant H. C. Kearby is one of the members of ORT constituting a class. At the time of service of process upon him, Kearby was also Second Vice-President of ORT and was one of nine Vice-Presidents of that Organization. He retired as Second Vice-President of ORT in 1953 but he is still a member of ORT.

31. When this action was commenced and when Kearby was served with process, he resided in Cook County, Illinois, and he maintained an office in his home in that County.

32. Kearby is sued individually, as an officer and managing agent of ORT, as a representative of the Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment, of ORT, and as representative of the members of ORT constituting a class.

33. Kearby retired in 1953 and moved to Florida. At that time, he had been a Vice-President of ORT for more than 12 years. Kearby was elected by delegates to the Conventions of ORT who had been elected by members of ORT Lodges throughout the United States, including the ORT Lodges on MKT.

34. While a Vice-President of ORT, Kearby was required by ORT's Constitution to devote his entire time to the interest of ORT under instructions from its President.

35. Before his election as a Vice-President of ORT, Kearby was a Local Chairman of ORT for 5 years and a General Chairman of ORT for 12 years, both on the

Chicago, Milwaukee, St. Paul and Pacific Railroad; and, in those capacities, Kearby interpreted ORT's collective agreement with that Company and handled claims and grievances based upon the rules and working conditions of that agreement.

36. As required by ORT's Constitution, Kearby made printed reports of his official acts and work to each regular session of the Grand Division of ORT. Those reports and his testimony in this case show:

(a) During the period 1940 to 1953, Kearby, as a Vice-President of ORT, represented that Organization on assignments from its President, in a multitude of controversies on 54 railroads, including:

Atchison, Topeka and Santa Fe
Atlantic Coast Line
Chicago, Burlington and Quincy
Chicago and Eastern Illinois
Chicago Great Western
Chicago and North Western
Chicago, Rock Island and Pacific
Colorado Southern
Denver & Rio Grande Western
Erie
Florida East Coast
Gulf, Mobile & Ohio
Illinois Central
Michigan Central
Missouri-Kansas-Texas
Missouri Pacific
New York Central
Northern Pacific
Pennsylvania
Pere Marquette
Pittsburgh & Lake Erie
Rutland
St. Louis Southwestern
Southern Pacific
Texas & Pacific
Union Pacific

(b) Kearby performed those duties in Washington, D. C. and at other places such as:

State	*City*
Alabama:	Mobile
California:	Los Angeles; San Francisco
Colorado:	Denver
Florida:	St. Augustine
Illinois:	Chicago
Indiana:	Indianapolis
Michigan:	Detroit
Minnesota:	Duluth; Minneapolis; St. Paul
Missouri:	Kansas City; St. Louis
Nebraska:	Omaha
North Carolina:	Wilmington
Ohio:	Cincinnati
Pennsylvania:	Pittsburgh
Texas:	Dallas; Fort Worth; Houston; San Antonio
Washington:	Spokane

(c) Kearby's activities, as a member and as a Vice-President of ORT, covered a variety of subjects affecting ORT, its members, and the class or craft represented by it, including:

(1) Negotiating rules and working conditions and making collective agreements on numerous railroads.

(2) Interpreting agreements between ORT and various railroads.

(3) Preparing ORT cases for submission to the National Mediation Board and representing ORT in more than 20 mediation cases on various railroads and in hearings before that Board in Washington, D. C.

(4) Representing ORT in negotiating agreements providing for employee representation in the administration of railroad hospital associations.

(5) Disposing of claims and grievances on various railroads in conferences with General Chairmen of ORT and railroad officials.

(6) Assisting General Chairmen of ORT in in-

terpreting and applying ORT agreements on all types of claims.

(7) Negotiating supplements to ORT collective agreements on various railroads to include provisions of the National 40-Hour Week Agreement.

(8) Negotiating for increases in rates of pay of specific positions on various railroads.

(9) Acting as ORT's representative in hearings on line abandonment applications conducted by the Interstate Commerce Commission at various places, including Washington, D. C.

(10) Opposing applications to State Commissions for authority to close railroad stations.

(11) Preparing cases, in the office of ORT's President, for submission to the Third Division of the National Railroad Adjustment Board.

(12) Serving as ORT Member of the Third Division of the National Railroad Adjustment Board.

(13) Directing, from Peoria, Illinois, the activities of ORT members during the railroad strike on the Toledo, Peoria & Western, from October 1, 1945 to May 1, 1947.

(14) Conferring, at Dallas, Texas, with ORT General Chairman Thompson, and personally handling a dispute on MKT between ORT and the International Brotherhood of Electrical Workers.

(15) Gathering data for use by ORT in its unsuccessful effort to intervene in BRC cases before the Board, involving station clerical work; and handling disputes created between ORT and the Missouri Pacific Railroad Company when that Company transferred station clerical work from employees subject to its agreement with ORT to employees subject to its agreement with BRC.

37. H. C. Kearby is such a member of the ORT class as will fairly insure the adequate representation in this cause of all members of said class.

38. H. C. Kearby is a person whose relationship to

ORT is such that it could reasonably be expected that he would give, and he did give, notice of this action to ORT.

39. H. C. Kearby is a person whose relationship to ORT is such that it could be reasonably expected that he would give notice of this action to ORT's Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment.

40. Defendant R. B. Boyington is one of the members of ORT constituting a class. He is also a director of ORT and Chairman of its Board of Directors.

41. Boyington maintains an office in the City of Chicago, Cook County, Illinois, and he resides in Cook County, Illinois.

42. Boyington is sued individually, as an officer and managing agent of ORT, as a representative of the Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment, of ORT, and as a representative of the members of ORT constituting a class.

43. Boyington was appointed a director in April 1944 to fill a vacancy. He was elected a director at the 1946 Convention of ORT by the delegates who had been elected by members of ORT Lodges throughout the United States, including ORT Lodges on MKT. On October 1, 1952, the directors elected Boyington as Chairman of the Board.

44. Boyington is also General Chairman of Subordinate Division 76 of ORT and is Division Chairman of ORT on the Chicago and North Western Railroad. He has been a General Chairman of ORT for 32 years and Local Chairman in the Chicago Terminal for 40 years.

45. In the capacity of Local Chairman, Boyington handled employee grievances with the General Chairman and railroad officers, and he also handled claims of employees

based on alleged violations of collective agreements by the railroad.

46. As General Chairman, Boyington negotiated, signed and approved BRC collective agreements; interpreted or applied such agreements; and participated in mediation proceedings on disputes under them.

47. As required by ORT's Constitution, the Board of Directors made printed reports of all its official acts to each regular session of the Grand Division of ORT. Those reports and the testimony of Boyington in this case show:

(a) Many powers are conferred upon the Board of Directors of ORT by Article 13 of its Constitution. Among others, the Board is authorized to entertain all appeals from decisions of ORT's Grand Officers. While Boyington has been a member, the Board of Directors has entertained 68 appeals from decisions of the President of ORT. Those appeals involved disputes on many railroads, including:

Baltimore and Ohio
Boston & Maine
Chesapeake and Ohio
Chicago, Burlington and Quincy
Chicago, Milwaukee, St. Paul and Pacific
Chicago, Rock Island and Pacific
Delaware, Lackawanna & Western
Erie
Illinois Central
Louisiana and Arkansas
Louisville & Nashville
New York Central
Northern Pacific
Pennsylvania
St. Louis-San Francisco
Seaboard Air Line
Southern Pacific
Union Pacific
Wabash

(b) The appeals to the Board of Directors of ORT were from the following States:

California	Missouri
Florida	Nebraska
Indiana	New York
Iowa	Pennsylvania
Louisiana	South Dakota
Maine	Tennessee
Minnesota	Texas

(c) The activities of Boyington, as a member of the Board of Directors of ORT, have covered a wide range of subjects affecting ORT, its members, and the class or craft represented by it, including:

(1) Ruling on appeals from decisions of the President, regarding:

a. Interpretation of ORT's collective agreements as to seniority, displacement, and other employment rights.

b. Authority of General Chairmen to negotiate amendments to current collective agreements.

c. Validity of compromise settlement of dispute over request for upward adjustment of rates of pay of certain positions.

d. Reinstatment of discharged employee to his former position.

e. Legality of obtaining vote of members of General Committee by means of a mail ballot instead of at a meeting of the General Committee.

f. Extent of penalty which should be imposed on an officer of ORT whose removal was demanded by a member on the ground of unbecoming conduct.

g. Duty of a General Chairman to vote in order to break a tie vote of the General Committee, instead of declaring the measure lost by reason of a tie.

h. Whether appellant should have been called for service when a railroad permitted the use of teletype machines to receive incoming messages and other matters of record during hours when ORT employees were not assigned to duty.

i. Whether blocking of trains by switch-tenders during the Laramie Avenue underpass construction by the City of Chicago, in 1949, was a violation of the Joint Relations Agreement of 1934 which ORT and the Brotherhood of Railroad Trainmen (BRT) negotiated for the purpose of providing a basis of settling jurisdictional disputes between ORT and BRT.

j. Should a railroad employee, while employed as a staff officer of ORT, be entitled to an indefinite leave of absence with right to return to his railroad position.

k. Should an improperly classified employee be removed from a position upon being properly classified or should the position be bulletined.

l. When an employee is discharged for cause and does not appeal, is he, upon being rehired, entitled to his previous standing on the seniority roster.

m. Was an election for the unexpired term of a Local Chairman valid when it included two districts before their consolidation had been duly consummated.

(2) Conferring with ORT President Leighty concerning the advisability of his accepting the Chairmanship of the Railway Labor Executives' Association, and approving his acceptance of that position.

(3) Conferring with ORT President and members of his staff, concerning schedule matters and appeal cases on the Delaware, Lackawanna & Western Railroad.

(4) Keeping fully informed of all business transactions of ORT.

(5) Requiring the officers of ORT to file bonds satisfactory to the Board of Directors and exercising charge of such bonds.

(6) Exercising full power to enforce the laws of ORT as they affect the work of the Grand Officers.

48. R. B. Boyington is such a member of the ORT class as will fairly insure the adequate representation in this cause of all members of said class.

49. R. B. Boyington is a person whose relationship to ORT is such that it could reasonably be expected that he would give notice of this action to ORT and to its Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment.

50. Defendant J. W. Whitehouse is one of the members of ORT constituting a class. He is also Seventh Vice President of ORT and a labor member of the Third Division of the National Railroad Adjustment Board.

51. Whitehouse maintains an office and resides in the City of Chicago, Cook County, Illinois.

52. Whitehouse is sued individually, as an officer and managing agent of ORT, as a representative of the Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment, of ORT, and as a representative of the members of ORT constituting a class.

53. Whitehouse was appointed Seventh Vice-President of ORT, by its Board of Directors, to fill a vacancy, effective March 1, 1950. He was elected to that position at the regular session of the Grand Division of ORT in 1952 by the delegates who had been elected by the members of the Lodges of ORT throughout the United States, including those on MKT.

54. Whitehouse is required by ORT's Constitution to devote his entire time to the interests of ORT under instructions from its President.

55. Before his appointment as Seventh Vice-President of ORT, Whitehouse was ORT General Chairman on the following railroads: Kentucky & Indiana Terminal; Chicago, Indianapolis and Louisville; Elgin, Joliet & Eastern; and Chicago and Eastern Illinois. In those capacities, Whitehouse negotiated collective bargaining agreements be-

tween ORT and those Companies, interpreted those agreements, and handled claims and grievances based upon the rules and working conditions set forth in those agreements. He also assisted ORT President Leighty, members of his staff, and officers and representatives of other non-operating labor organizations in handling disputes submitted to the 40-Hour Week Committee in Chicago; and read, analyzed, classified and indexed more than 5000 disputes submitted to that Committee for decision, involving all non-operating crafts and practically every railroad in the United States, as a result of the efforts of those organizations to conform individual agreements to the National 40-Hour Week Agreement.

56. As required by ORT's Constitution, Whitehouse made a printed report of his official acts and work as a Vice-President to the regular session of the Grand Division of ORT in June, 1952. That report and the testimony of Whitehouse in this case show:

(a) Since March 1, 1950, J. W. Whitehouse, as a Vice-President of ORT, has represented that Organization, on assignments from its President, in a multitude of controversies on 20 railroads, including:

Baltimore & Ohio
Central of Georgia
Chesapeake and Ohio
Chicago and North Western
Chicago, Indianapolis and Louisville
Delaware, Lackawanna & Western
Gulf, Mobile and Ohio
Louisville & Nashville
Missouri-Kansas-Texas
Missouri Pacific
Norfolk Southern
Union Pacific

(b) Whitehouse performed those duties in many places, including:

State	*City*
Alabama:	Montgomery
Georgia:	Atlanta
Illinois:	Chicago
Indiana:	LaFayette
Kentucky:	Louisville
Maryland:	Baltimore
Michigan:	Manistee
Missouri:	St. Louis
New York:	New York
North Carolina:	Wilmington; Raleigh
Pennsylvania:	Scranton
Virginia:	Richmond

(c) The activities of Whitehouse, as a Vice-President of ORT, covered a wide range of subjects affecting ORT, its members, and the class or craft represented by it, including:

(1) Assisting ORT President, members of his staff, and officers and representatives of other non-operating labor organizations, in handling disputes submitted to the 40-Hour Week Committee in Chicago.

(2) Assisting ORT committees with numerous problems arising from application of the 40-Hour Week rules.

(3) Assisting ORT President and his staff in preparing submissions, oral arguments and rebuttals in various disputes taken to the Board as a result of efforts of ORT to supplement individual agreements to conform to the provisions of the National 40-Hour Week Agreement.

(4) Assisting with the preparation of submissions to the Board in disputes originating on MKT and other railroads.

(5) Conferring with ORT General Chairmen and railroad officials, and conforming collective agreements to the National 40-Hour Week Agreement.

(6) Arguing ORT cases before the Board.

(7) Assisting General Chairmen in opposing the discontinuance of station agencies.

(8) Representing ORT in protecting employees involved in the Pennsylvania-Grand Trunk-Monon coordination of towers at Maynard, Indiana.

(9) Conferring with General Chairmen and with officers of the Chesapeake and Ohio Railway Company, in connection with employee displacement problems resulting from the coordination of the communication services in Chicago.

(10) Conferring with General Chairmen and railroad officials concerning jurisdictional disputes resulting from the assignment of communication work to employees not represented by ORT.

(11) Handling claims and grievances of employees, including jurisdictional disputes affecting other organizations.

(12) Attending meetings of General Chairmen's Association and engaging in ORT organization work.

(13) Participating in conferences for the consolidation, revision and unification of the agreements between ORT and the four railroad companies which merged into the Gulf, Mobile and Ohio Railroad Company.

57. J. W. Whitehouse is such a member of the ORT class as will fairly insure the adequate representation in this cause of all members of said class.

58. J. W. Whitehouse is a person whose relationship to ORT is such that it could reasonably be expected that he would give notice of this action to ORT and to its Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment.

59. The disputes submitted to the Board by BRC and ORT which resulted in Awards 3932, 3933, 3934, 4735 and 5014, raised this fundamental question: What class of employees (those represented by BRC or those represented by ORT) has the right to perform station clerical work. This has been a longstanding jurisdictional dispute between

BRC and ORT on railroads throughout the United States which affects all members of BRC and ORT.

60. The jurisdictional dispute between BRC and ORT as to what class of employees has the right to perform station clerical work adversely affects the members and procedure of the Board, and, at the instigation of the President of BRC, resulted in the dismissal in 1942 of H. C. Kearby, ORT Board member.

61. Kearby was dismissed from the Board by majority vote of the chief executives of railroad labor unions, known as the Railway Labor Executives' Association, who select, control and discipline labor members of the Board, determine their policies as to Board procedure, and exert the power of the Association to enforce compliance with awards of the Board.

62. After the dismissal of H. C. Kearby as ORT Board member, ORT was left without a representative on the Board, and ORT was denied the right to intervene in BRC cases before the Board.

63. In subsequent litigation, ORT sought to establish its right to intervene in BRC cases before the Board. As a result of those efforts, ORT was threatened, on charges brought by BRC, with expulsion from the American Federation of Labor.

[*Policy of Labor Members of NRAB*]

64. ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board procedure and joining BRC and other labor organizations in the following agreement:

> "The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided

> the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decisions of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act."

This was the same procedural program previously advocated by BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board.

65. On October 11, 1943, BRC submitted to the Board, in Docket CL-2544, the following claims against MKT, relating to "incidental clerical work" at Altus, Oklahoma:

> "(1) The carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization when on May 1, 1943, after due notice, it failed and refused to assign to positions covered by the said agreements, incidental clerical work, then and now performed at Altus, Oklahoma, by the Agent-Yardmaster, the so-called Telegrapher-Cashier and the so-called Telegrapher-Clerk; and
>
> "(2) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and

"(3) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to:

"(a) Recreate the position of Chief Clerk—rate $7.10 per day, and

"(b) Recreate the position of Cashier—rate $6.60 per day, and

assign to the said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, there to remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the *Railway Labor Act—1934—amended*; and

"(4) That the said positions of Chief Clerk and Cashier be advertised and assigned under the appropriate rules of the agreement as of May 1, 1943, and that any and all other employes adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties to positions and or persons not covered by the clerical agreement, shall be reimbursed for all their money losses."

66. By letter dated November 29, 1943, V. O. Gardner, President of ORT, informed the Board that certain employees of MKT represented by ORT were involved in the dispute filed with the Board by BRC; that those employees had expressed themselves as being materially affected by the outcome of that dispute; that they had signified a desire to present their interest before the Board when hearings were held or other adjudicatory action was taken on BRC's claim; that said employees desired to be represented before the Board by ORT, through its duly accredited officers or agents; that there were parties other than the claimant and MKT who were interested and involved in the dispute and who would be affected by an award; and Gardner expressed a desire to be notified promptly of any action by the Board

so that ample opportunity would be afforded such employees or their representatives to participate in any hearings or deliberations which might be conducted by the Board.

Gardner enclosed with his letter of November 29, 1943, separate letters dated November 20, 1943, each addressed to the Board by G. M. Singletary, J. C. Parks, and E. Dowdy, who held the positions of Agent-Yardmaster, Telegrapher-Cashier and Telegrapher-Clerk, respectively, for MKT at Altus, Oklahoma. Each of those letters quoted BRC's claims, as set forth in Finding 65, then pending before the Board, and each letter concluded with the following three paragraphs:

> "I am involved in this dispute for the reason that I am one of the employees referred to in the above claim, and I consider that my interests and rights will be adversely affected and placed in jeopardy if this claim should be sustained.
>
> "I therefore respectfully request a hearing as provided for by the Railway Labor Act, which procedure is in accord with an opinion given on the subject by the Attorney General of the United States.
>
> "Being unable to appear in person before your Division, I hereby authorize The Order of Railroad Telegraphers, its officers or agents, to act as my duly accredited representative at any or all hearings on said claim. I delegate to The Order of Railroad Telegraphers full authority to appear thereat as my counsel and file briefs in my behalf."

67. In eight dockets, including CL-2544, the Board deadlocked on the issue of giving notice of hearings to employees or Organizations other than those named as parties to the disputes. As stated in the Board's minutes of March 16, 1944, the issue was:

> "Dockets CL-2374, CL-2379, CL-2400, CL-2425, MW-2367, CL-2499, CL-2526, CL-2527 and CL-2544 are deadlocked on the issue of giving notice to persons or

organizations, other than parties to the disputes, whose interests may be affected by awards on the merits. The Carrier Members take the position that binding and conclusive awards can be rendered only after notice given to all whose rights may be involved."

The Board, with Referee Bruce Blake sitting as a member, decided that the dockets should be set down for hearings on the merits, without notice to anyone except those parties named in the disputes. Accordingly, notice of the hearing in Docket CL-2544 was given to BRC and MKT, but no notice was given to ORT, or to its officers, agents, representatives or members, or to G. M. Singletary, or to J. C. Parks, or to E. Dowdy.

68. In its "Statement of Facts" in Docket CL-2544, MKT declared: (1) that its agreement with ORT antedated its agreement with BRC; (2) that its telegraph employees had always performed and were then performing, in varying volume and often for the major part of their tour of duty, clerical work of practically every character; (3) that this was true before, at the time of, and since adoption of the original BRC agreement and the revisions thereof; and (4) that employees holding the positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma, always had performed and were then performing clerical work in varying degrees.

69. Under the heading "Carrier's Position" in Docket CL-2544, MKT asserted that the general performance of clerical work by employees under ORT's agreement was a long, widespread, and well-known practice before MKT had any agreement with BRC; and that BRC for many years had acquiesced in the performance of general clerical work, without restrictions as to volume, by employees of practically every job classification under ORT's agreement.

70. The Board held a hearing on the merits of BRC's claim in Docket CL-2544. BRC and MKT, acting by and

through their representatives, were the only parties who appeared and participated in that hearing.

71. After a hearing on the merits, the Board, with Referee Bruce Blake sitting as a member, on June 1, 1944, rendered Award 2597 in Docket CL-2544. The Board adhered to its former decision that notice of hearing should be given only to parties named in the dispute, but the Board, in accordance with its decision in Award 2596, Docket CL-2527, dismissed the case, without prejudice, because: (1) ORT had a vital interest in the outcome of the dispute; (2) to sustain the claim would deprive ORT and its members of most substantial and valuable rights; and (3) to deprive them of such rights, without giving them an opportunity to be heard, would be subversive of democratic principles and processes.

72. On June 29, 1944, BRC submitted to the Board, in Docket CL-2751, the following claims against MKT relating to "incidental clerical work" at Atoka, Oklahoma:

> "(1) The carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization, when on September 14, 1943, after due notice, it failed and refused to assign to positions covered by the said agreements, incidental clerical work then and now performed at Atoka, Oklahoma, by employes working outside the scope of the clerical agreement; and,
>
> "(2) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and,
>
> "(3) That the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to create and maintain appropriate positions under the clerical

agreement and assign to the said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, there to remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the Railway Labor Act—1934—amended; and,

"(4) That the said positions shall be advertised and assigned under the appropriate rules of the agreement as of September 14, 1943, and that any and all employes adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties to the positions and or persons not covered by the clerical agreement, shall be reimbursed for all their money losses."

73. In its "Statement of Facts" in Docket CL-2751, MKT declared: (1) that its agreement with ORT antedated its agreement with BRC; (2) that its telegraph employees had always performed and were then performing, in varying volume and often for the major part of their tour of duty, clerical work of practically every character; and (3) that this was true before, at the time of, and since adoption of the original BRC agreement and the revisions thereof.

74. Under the heading "Carrier's Position" in its original submission in Docket CL-2751, MKT advised the Board that ORT "has a direct and substantial interest in this case; and that it should be made a party hereto"; and MKT asserted that the general performance of clerical work by employees under ORT's agreement was a long, widespread and well-known practice before MKT had any agreement with BRC; and that BRC for many years had acquiesced in the performance of general clerical work, without restrictions as to volume, by employees of practically every job classification under ORT's agreement.

75. On July 31, 1944, BRC requested the Board's permission to withdraw the case covered by Docket CL-2751.

This request was granted and, on August 2, 1944, that case was dismissed by Award 2650.

76. On June 29, 1944, BRC submitted to the Board, in Docket CL-2752, the following claims against MKT relating to "incidental clerical work" at Junction City, Kansas; Chanute, Kansas; Lockhart, Texas; and Stamford, Texas:

> "(1) The carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization, when on October 4, 1943, after due notice, it failed and refused to assign to positions covered by the said agreements, incidental clerical work then and now performed at Junction City, Kansas, Chanute, Kansas, Lockhart, Texas, Stamford, Texas, by employees working outside the scope of the clerical agreement; and,
>
> "(2) That the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and,
>
> "(3) That the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to create and maintain appropriate positions under the clerical agreement and assign to the said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, there to remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the Railway Labor Act—1934—amended; and
>
> "(4) That the said positions shall be advertised and assigned under the appropriate rules of the agreement as of October 4, 1943, and that any and all employes adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties

to the positions and or persons not covered by the clerical agreement, shall be reimbursed for all their money losses."

77. In its "Statement of Facts" in Docket CL-2752, MKT declared: (1) that its agreement with ORT antedated its agreement with BRC; (2) that its telegraph employees had always performed and were then performing, in varying volume and often for the major part of their tour of duty, clerical work of practically every character; and (3) that this was true before, at the time of, and since adoption of the original BRC agreement and the revisions thereof.

78. Under the heading "Carrier's Position" in its original submission in Docket CL-2752, MKT advised the Board that ORT "has a direct and substantial interest in this case; and that it should be made a party thereto"; and MKT asserted that the general performance of clerical work by employees under ORT's agreement was a long, widespread and well-known practice before MKT had any agreement with BRC; and that BRC for many years had acquiesced in the performance of general clerical work, without restrictions as to volume, by employees of practically every job classification under ORT's agreement.

79. On July 31, 1944, BRC requested the Board's permission to withdraw the case covered by Docket CL-2752. This request was granted and, on August 2, 1944, that case was dismissed by Award 2651.

80. On April 17, 1947, BRC submitted to the Board in Docket CL-3714 the identical claims quoted in Finding 65 relating to "incidental clerical work" at Altus, Oklahoma, which claims were first submitted to the Board on October 11, 1943, in Docket CL-2544, and dismissed, without prejudice, on June 1, 1944, by Award 2597.

81. BRC's ex parte submission in Docket CL-3714, and other documents filed by BRC in that docket, showed that

ORT and employes of MKT subject to the collective agreement between MKT and ORT were involved in the dispute and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

82. In its "Statement of Facts" in Docket CL-3714, MKT adopted all of its statements of fact in Docket CL-2544, including those set forth in Finding 68. MKT also called the Board's attention to Award 2597 which dismissed, without prejudice, the identical claims presented in Docket CL-2544 because: (1) ORT had a vital interest in the outcome of the dispute; (2) to sustain the claims would deprive ORT and its members of most substantial and valuable rights; and (3) to deprive them of such rights, without giving them an opportunity to be heard, would be subversive of democratic principles and processes.

83. Under the heading "Position of Carrier" in its submission in Docket CL-3714, MKT called the Board's attention to the absence of ORT, in these words:

> "This claim * * * has not made and does not contemplate making The Order of Railroad Telegraphers a party to the action, but rather seeks to exclude that organization.
>
> "No notice is given to a party to be affected. No opportunity is given such party to be heard and present every available defense."

84. Notice of the hearings in Docket CL-3714 was given to BRC and MKT but no notice was given to ORT, or to its officers, agents, representatives, or members, or to the persons holding the affected positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma.

85. The Board held a hearing on the merits of BRC's claims in Docket CL-3714. BRC and MKT, acting by and through their representatives, were the only parties who appeared and participated in that hearing.

86. On June 10, 1948, the Board, with Referee James M. Douglas sitting as a member thereof, rendered Award 3932 in Docket CL-3714, sustaining claims (1), (2), and (3), and all of claim (4) except the demand for money losses. On the same date, the Board issued an Order directing MKT to make that award effective.

87. The Board issued Award 3932, and the Order accompanying that Award, without giving ORT and the Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma, an opportunity to be heard in Docket CL-3714.

88. At the request of BRC, the Board, with Referee James M. Douglas sitting as a member thereof, on December 20, 1949, issued Interpretation No. 1 to Award 3932 in Docket CL-3714, declaring that "the Award ruled in effect":

> "1. That the clerical work in question should have been assigned to positions under the Clerks' Agreement, and Carrier violated such Agreement by permitting the three employes under the Telegraphers' Agreement at Altus to perform it.
>
> "2. That Carrier improperly refused to restore such work to the Clerks.
>
> "3. That Carrier was ordered to recreate the positions of Chief Clerk and of Cashier at Altus, and to restore such work to those positions.
>
> "4. That Carrier was ordered to advertise and assign such positions to Clerks, but without liability for retroactive penalties."

There was no hearing on BRC's request for this interpretation and the Board gave no notice of the filing of this

request to ORT, or to its officers, agents, representatives, or members, or to the persons holding the affected positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma.

88½.[1] On November 23, 1949, MKT replied to BRC's request for an interpretation of Award 3932. Among other things, MKT adopted the "position and defenses" which it had urged in Dockets CL-2544 and CL-3714, as set forth in Findings 68-69 and 82-83, and cited the following cases in support of its position:

> "*Hunter, et al.* v. *A. T. & S. F. and C. D. Shepherd, et al.*, 78 F. Supp. 984 [15 Labor Cases, ¶ 64,872], 171 F. (2) 594 [15 Labor Cases ¶ 64,878], certiorari denied 337 U. S. 916, 69 S. Ct. 1157,
>
> "*Templeton* v. *A. T. & S. F. Ry.*, 84 F. Supp. 162 [16 Labor Cases ¶ 65,069],
>
> "*Reynolds* v. *D. & R. G. W. R. R. Co.*, 174 F. (2) 673 [16 Labor Cases ¶ 65,147],
>
> "*Ramsey* v. *C. & O. R. R. Co.*, 75 F. Supp. 740 [14 Labor Cases ¶ 64,435],
>
> "*Southern Pacific Co.* v. *Bishop, et al.*, U. S. Dist. Ct., Northern Dist. of Ill., Eastern Division [13 Labor Cases ¶ 63,896]";

MKT followed the citation of these cases with these statements:

> "In the case of *Hunter* v. *A. T. & S. F., Shepherd, et al.* [15 Labor Cases ¶ 64,878], the Seventh Circuit Court of Appeals declared Award No. 6640 of the First Division, National Railroad Adjustment Board, void and permanently enjoined enforcement because train porters adversely affected by the award had not been given notice of the hearing and an opportunity to be heard as required by due process of law.
>
> "In *Templeton* v. *A. T. & S. F. Ry.* [18 Labor Cases ¶ 65,708], cited above the U. S. Court held awards

1. Finding 88½ was added as a supplement, approved and entered September 4, 1954.

Nos. 6635, 6637, 6638, and 6639 of First Division, NRAB, void because employes represented by *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes,* who were adversely affected, had not been given notice and hearing in accordance with due process of law.

"No notice was ever given any employe of hearing in this case and the award can not be used in behalf of any employe. It is elemental that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not before it by due process of law; *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, p. 362 [2 Labor Cases ¶ 17,056]; *Pennoyer* v. *Neff,* 95 U. S. 714; *Riverside & Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189; *Arizona* v. *California,* 298 U. S. 558, 571, 572; *E. J. & E. R. R.* v. *Burley,* 325 U. S. 711, 65 S. Ct. 1282 [9 Labor Cases ¶ 51,212]."

On December 3, 1949, BRC answered the above mentioned reply of MKT. Among other things, BRC attempted to distinguish the *Hunter* case, and also made the following statement:

"A careful reading of the carrier's (MKT) letter of November 29, 1949, very conclusively shows the necessity for the requested interpretation for the reason that, the Award notwithstanding, the carrier is still insisting that it has the same right now that it had under the *National Agreement* to assign the work of writing and calculating incident to keeping records, accounts, etc., to agents and telegraphers, as was urged by it prior to the rendition of Award No. 3932."

89. On April 17, 1947, BRC submitted to the Board, in Docket CL-3715, the identical claims quoted in Finding 76, relating to "incidental clerical work" at Junction City, Kansas; Chanute, Kansas; Lockhart, Texas; and Stamford, Texas; which claims were first submitted to the Board on June 29, 1944, in Docket CL-2752, and dismissed on August 2, 1944, at the request of BRC by Award 2651.

90. BRC's ex parte submission in Docket CL-3715, and other documents filed by BRC in that docket, showed that ORT and employees of MKT subject to the collective agreement between MKT and ORT were involved in the dispute and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

91. In its "Statement of Facts" in Docket CL-3715, MKT adopted all its statement of fact in Docket CL-2752, including those set forth in Finding 77. MKT also called the Board's attention to Award 2597 which dismissed similar claims in Docket CL-2544 because: (1) ORT had a vital interest in the outcome of the dispute; (2) to sustain the claims would deprive ORT and its members of most substantial and valuable rights; and (3) to deprive them of such rights, without giving them an opportunity to be heard, would be subversive of democratic principles and processes.

92. Under the heading "Position of Carrier" in its submission in Docket CL-3715, MKT called the Board's attention to the absence of ORT, in these words:

> "This claim . . . has not made and does not contemplate making The Order of Railroad Telegraphers a party to the action, but rather seeks to exclude that organization.
>
> "No notice is given to a party to be affected. No opportunity is given such party to be heard and present every available defense";

and MKT adopted its position as stated in Docket CL-2752, including the matters and things set forth in Finding 78.

93. Notice of the hearing in Docket CL-3715 was given to BRC and MKT but no notice was given to ORT, or to its

officers, agents, representatives, or members, or to the persons holding the positions of Agent and Telegrapher-Cashier at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; Agent-Telegrapher, and Telegrapher-Cashier at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas.

94. The Board held a hearing on the merits of BRC's claims in Docket CL-3715. BRC and MKT, acting by and through their representatives, were the only parties who appeared and participated in that hearing.

95. On June 10, 1948, the Board, with Referee James M. Douglas sitting as a member thereof, rendered Award 3933 in Docket CL-3715, sustaining claims (1), (2), and (3), and all of claim (4) except the demand for money losses. On the same date, the Board issued an Order directing MKT to make that award effective.

96. The Board issued Award 3933, and the Order accompanying that Award, without giving ORT and the Agent, and Telegrapher-Cashier, at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; Agent-Telegrapher, and Telegrapher-Cashier at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas, an opportunity to be heard in Docket CL-3715.

97. On April 17, 1947, BRC submitted to the Board, in Docket CL-3716, the identical claims quoted in Finding 72, relating to "incidental clerical work" at Atoka, Oklahoma, which claims were first submitted to the Board on June 29, 1944, in Docket CL-2751, and dismissed on August 2, 1944, at the request of BRC, by Award 2650.

98. BRC's ex parte submission in Docket CL-3716, and other documents filed by BRC in that docket, showed that ORT and employees of MKT subject to the collective agree-

ment between MKT and ORT were involved in the dispute and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

99. In its "Statement of Facts" in Docket CL-3716, MKT adopted all its statements of fact in Docket CL-2751, including those set forth in Finding 73. MKT also called the Board's attention to Award 2597 which dismissed similar claims in Docket CL-2544 because: (1) ORT had a vital interest in the outcome of the dispute; (2) to sustain the claims would deprive ORT and its members of most substantial and valuable rights; and (3) to deprive them of such rights, without giving them an opportunity to be heard, would be subversive of democratic principles and processes.

100. Under the heading "Position of Carrier" in its submission in Docket CL-3716, MKT called the Board's attention to the absence of ORT, in these words:

> "This claim . . . has not made and does not contemplate making The Order of Railroad Telegraphers a party to the action, but rather seeks to exclude that organization.
>
> "No notice is given to a party to be affected. No opportunity is given to such party to be heard and present every available defense";

and MKT adopted its position as stated in Docket CL-2751, including the matters and things set forth in Finding 74.

101. Notice of the hearing in Docket CL-3716 was given to BRC and MKT but no notice was given to ORT, or to its officers, agents, representatives, or members, or to the persons holding the affected positions of Agent and Telegrapher-Clerk at Atoka, Oklahoma.

102. The Board held a hearing on the merits of BRC's claims in Docket CL-3716. BRC and MKT, acting by and through their representatives, were the only parties who appeared and participated in that hearing.

103. On June 10, 1948, the Board, with Referee James M. Douglas sitting as a member thereof, rendered Award 3934 in Docket CL-3716, sustaining claims (1), (2), and (3), and all of claim (4) except the demand for money losses. On the same date, the Board issued an Order directing MKT to make that award effective.

104. The Board issued Award 3934, and the Order accompanying that Award, without giving ORT, and the Agent and Telegrapher-Clerk at Atoka, Oklahoma, an opportunity to be heard in Docket CL-3716.

105. BRC, acting by and through A. J. Pickett, General Chairman of BRC on MKT, interpreted Awards 3932, 3933, and 3934, as applying to all stations on MKT. Only six stations were named in those awards. On June 22, 1948, Pickett circularized "All Division Chairmen" on MKT, sending them copies of Awards 3932, 3933, and 3934, and instructing them as follows:

> "Inasmuch as it has legally and lawfully (been) determined that our (BRC) agreement comprehends in its coverage all incidental clerical work, it is incumbent upon you to bring about one hundred per cent enforcement of this fact. Will each of you therefore as promptly as is possible make or have made a study of the clerical work performed by the agents, telegraph-operators and others at the following points . . . (naming 33 MKT stations in Missouri, Kansas, Oklahoma and Texas), and any and all other points on your division where you have any information about the violation of our agreement with respect to the question covered by the enclosed decisions.
>
> "I appreciate that it will be quite a job to get this information together but at points where we have

members working you can address communications to them and secure the information from them. Be particularly sure to tell them that you want an exact detail of the work performed by operators and agents so that a study will stand up under the closest investigation. Please give this matter your prompt attention and let me have the information at your earliest as it is necessary that it be in my possession when I meet the management to undertake a settlement on this question."

106. On June 26, 1948, Pickett conferred with A. F. Winkel, Assistant General Manager of MKT, about Awards 3932, 3933, and 3934. Following that conference and on the same day, Pickett prepared, signed and handed Winkel a memorandum setting forth his interpretation of the awards. Among other things, Pickett said:

> "I think that a careful study of the Awards in the light of the pleadings of both parties clearly and conclusively indicates that it was the position of the Referee that at any situation (station) on the railroad where clerical work occurred that the carrier is under legal obligation to create clerical positions to perform such work whether it be there presently or occurs in the future."

Pickett's memorandum also sets forth the following question and answer:

> "*Mr. Winkel asking question*:
>
> "Mr. Pickett, in order to have a clear understanding on just what you mean, do I understand from your remarks, that once clerical positions are established, that agents and telegraphers are prohibited from performing any clerical duties which they might have performed prior to the establishment of clerical positions?"
>
> "*Mr. Pickett answers*:
>
> "Mr. Winkel, I go farther than that, it is our position that when the Clerical agreement was signed that all clerical work incidental to keeping records and

> accounts on the railroad is covered by our agreement . . . Therefore it is my position that our agreement legally and lawfully covers all incidental clerical work of a nature incidental to the keeping of records and accounts irrespective of where it is found, or who is performing it at the present time, or previously performed it."

To comply with Pickett's interpretation of Awards 3932, 3933, and 3934, MKT would have to create 171 clerical jobs.

107. By letter dated June 28, 1948, Pickett put Winkel on notice that, if MKT did not comply with Awards 3932, 3933, and 3934 by August 1, 1948, claims would be filed after that date on behalf of all employees adversely affected by such non-action of MKT. In that letter, Pickett said in part:

> "This letter, therefore, is notice to the carrier that all of said positions, ordered created by the said awards, shall be advertised and assigned under the appropriate rules of the agreement as of August 1, 1948; that in the event the carrier fails or refuses to comply with the orders and awards of the Board, as above set out, on or before that date, that all employees adversely affected by the failure of the carrier to so act shall be made whole for any and all money losses, sustained by them as the result of the carrier's failure."

108. On August 2, 1948, Winkel wrote Pickett, saying:

> "The conclusions we have reached do not agree with the broad interpretation stated by you in your memorandum of June 26."

Winkel also informed Pickett, in that letter, that some rearrangement of force might be necessary at some stations in order to meet the requirements of the awards, but this would have to be considered in the light of MKT's current requirements, and that Pickett would be advised as to the changes placed in effect.

109. In a letter dated August 3, 1948, Pickett expressed dissatisfaction with Winkel's position and threatened suits to enforce Awards 3932, 3933, and 3934. In that letter, Pickett said:

> "I have been unable to secure from you an unequivocal answer to the effect that the Awards would be applied exactly as rendered; neither have I been able to secure from you a statement advising that the Awards were interpretative of the agreement and that the carrier would no longer insist upon executing its previous unilateral interpretations respecting the question of Agents and Telegraphers performing work covered by the Clerical Agreement."
>
> "This letter is, therefore, advice to you that unless we are advised by the carrier on or before August 10, 1948, that it will apply the Awards exactly as directed by the Third Division of the National Railroad Adjustment Board, we will after that date, and in accordance with the Railway Labor Act, institute appropriate action in the courts to enforce the Awards of the Board."

110. Winkel was aware that labor unions have used their economic strength to enforce compliance with awards of the Board.

111. BRC has a strike fund and has resorted to strike ballots to force compliance with awards as interpreted by it.

112. By letter dated August 17, 1948, Winkel informed Pickett that MKT was making the following changes:

> (a) At Altus, Oklahoma: Discontinue position of Telegrapher-Cashier under ORT agreement and create position of Cashier under BRC agreement. (Award 3932)
>
> (b) At Chanute, Kansas: Discontinue position of Telegrapher-Cashier under ORT agreement and create position of Cashier under BRC agreement. (Award 3933)

(c) At Lockhart, Texas: Discontinue position of Telegrapher-Cashier under ORT agreement and create position of General Clerk under BRC agreement. (Award 3933)

In the final paragraph of his August 17, 1948 letter, Winkel stated:

> "These changes in our opinion fully meet our obligations under these awards, and are not to be construed as a concurrence on our part with your broad interpretation that agents and telegraphers are prohibited from performing clerical work."

Winkel testified that by this paragraph of his letter he meant that he complied with the awards as he interpreted them, subject to current business demands, but that he did not agree with Pickett's interpretation of the awards.

Subsequent to said letter of August 17, 1948, as shown in Finding 88½, BRC requested an interpretation of Award 3932, MKT asserted the invalidity of that Award in its reply, and BRC admitted that MKT was still insisting that it had the right to assign clerical work to agents and telegraphers the same as before rendition of Award 3932.[1]

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1. The last paragraph of Finding 112 was added by a supplement, approved and entered September 4, 1954.

113. In a letter to Winkel, dated August 23, 1948, Pickett expressed dissatisfaction with the changes being made by MKT, and informed Winkel that he (Pickett) considered the August 17 letter as a refusal by MKT to apply Awards 3932, 3933, and 3934, as rendered. Pickett said in part:

> "The awards were very definite in that the carrier was ordered to reassign to clerical positions work then and now being performed by agents and others not covered by the Clerical Agreement. That the carrier has failed and refused to do."

• • • • •

"The Agent Yardmaster at Altus is now performing exactly the same assignment of clerical work as was performed by him at the time the issue was submitted to the Board. The carrier has done nothing about that situation. The same thing is true at Atoka, Chanute, Junction City, and Lockhart. At the Stamford Station the carrier has done nothing to reconcile the situation there with the awards of the Board."

* * * * *

"We, therefore, consider your letter of August 17, 1948, as declining to apply the awards as rendered by the Board and our future action in accomplishing that end will be governed by the circumstances and the law obtaining."

114. MKT made the changes described in Finding 112. MKT also created the position of Chief Clerk at Altus, Oklahoma, under BRC's agreement and later consolidated that position with the position of Cashier under BRC's agreement, described in Finding 112(a).

115. MKT transferred clerical work as follows:

(a) At Altus, Oklahoma, from the position of Telegrapher-Cashier under ORT's agreement to the position of Cashier under BRC's agreement;

(b) At Chanute, Kansas, from the position of Telegrapher-Cashier under ORT's agreement to the position of Cashier under BRC's agreement; and

(c) At Lockhart, Texas, from the position of Telegrapher-Cashier under ORT's agreement to the position of General Clerk under BRC's agreement.

116. The changes described in Finding 112; the creation of the position of Chief Clerk at Altus, Oklahoma, described in Finding 114; and the transfers of work described in Finding 115 were the only acts of partial compliance by MKT with Awards 3933 and 3934 and the accompanying Orders, and those changes and transfers were made because the BRC's insistence, demands, and coercive conduct.

117. After the transfer of work described in Finding 115, there was not enough work left to justify continuing the positions of Telegrapher-Cashier at Altus, Oklahoma; Telegrapher-Cashier at Chanute, Kansas; and Telegrapher-Cashier at Lockhart, Texas. Those positions were therefore abolished and the telegraphing work of those positions was assigned to other employees of MKT under ORT's agreement.

118. J. C. Parks, who sought to intervene in November, 1943, in Docket CL-2544, as set forth in Finding 66, held the position of Telegrapher-Cashier at Altus, Oklahoma, at the time that position was abolished.

119. To comply with Award 3932 at Altus, Oklahoma, MKT would be required to transfer to employees who are subject to BRC's agreement the clerical work being performed by the Agent-Yardmaster and the Telegrapher-Clerk who are subject to ORT's agreement.

120. To comply with Award 3933 at Junction City, Kansas, MKT would be required to transfer to an employee who is subject to BRC's agreement the clerical work being performed by the Agent-Telegrapher who is subject to ORT's agreement.

121. To comply with Award 3933 at Chanute, Kansas, MKT would be required to transfer to employees who are subject to BRC's agreement the clerical work being performed by the Agent and Telegrapher-Clerk who are subject to ORT's agreement.

122. To comply with Award 3933 at Lockhart, Texas, MKT would be required to transfer to an employee who is subject to BRC's agreement the clerical work being performed by the Agent-Telegrapher who is subject to ORT's agreement.

123. To comply with Award 3933 at Stamford, Texas, MKT would be required to transfer to employees who are

subject to BRC's agreement the clerical work being performed by the Agent, Telegrapher-Cashier, and Telegrapher-Clerk who are subject to ORT's agreement.

124. To comply with Award 3934 at Atoka, Oklahoma, MKT would be required to transfer to employees who are subject to BRC's agreement the clerical work being performed by the Agent and Telegrapher-Clerk who are subject to ORT's agreement.

125. To comply with Awards 3932, 3933, and 3934, as interpreted by BRC, MKT would be required to create 171 clerical positions and to transfer to those positions all clerical work being performed by employees who are subject to ORT's agreement.

126. On July 15, 1948, W. C. Thompson, General Chairman of ORT on MKT, addressed a letter to A. F. Winkel, Assistant General Manager of MKT, concerning Awards 3932, 3933, and 3934. After commenting that it appeared MKT was going ahead with arrangements to put on cashiers under BRC's agreement, at the stations named in those awards, Thompson said:

> "I would like to know what you intend to do with the telegraphers on these positions, as we are still contending for the positions as negotiated and do not concede that the National Railroad Adjustment Board can take away positions that we negotiated with the carrier before the Clerks had any such agreement. If the carrier doesn't want to be placed in the position of having two positions at the same place, you had better do something about it, as our Agreement was prior to any agreement with the Clerks and we are not going to give up any positions to the Clerks that we have negotiated with the carrier into our Agreement."

127. On July 27, 1948, Thompson wrote a joint letter to G. E. Leighty, President of ORT, and A. F. Winkel, Assistant General Manager of MKT, about Awards 3932,

3933, and 3934. Attached to that letter was a 15-page "memorandum or brief" which he described as an attack on "the legality of these awards." In the letter, Thompson said, in part:

> "I have made an extensive study of these awards and, as I have stated in my memorandum, the awards are full of contradictions as to the facts and violation of the Labor Act. I don't believe that even Mr. Douglas, the referee, or any member of the Board, can successfully argue that Congress intended that the Board should promulgate rules for any organization or carrier, as the law distinctly says they cannot, and that is what Mr. Douglas did for the Clerks. It is also an outstanding fact that Mr. Douglas, the referee, disregarded common law, usage and past practice and binding contract between The Order of Railroad Telegraphers and the Missouri-Kansas-Texas Railroad Company in disposing of the alleged claim of the clerks which was jurisdictional in nature and was a violation of the law and of the rules of procedure of the Board itself."
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> • • •
>
> "I am certain that Mr. Douglas, the referee, or any member of the Board, cannot and will not say that Congress, in enacting the Labor Act, intended to create another dispute through the National Railroad Adjustment Board in disposing of one and that is what Awards 3932, 3933, and 3934 actually accomplish. The referee gets entirely away from the facts when he states that the third party is 'indirectly' affected, when, as a matter of fact, The Order of Railroad Telegraphers, as well as the carrier, is 'directly' affected, as it takes the work and the positions away from The Order of Railroad Telegraphers and gives them to the Brotherhood of Railway and Steamship Clerks without examining the facts in the case as to the contractural (sic) relations between the ORT and the carrier."
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> • • •

"The Board overlooks the primary and essential fact that Agents work is at least 95% clerical work, depending upon the size of the station, and that clerks are secondary in importance and only used when additional service is to be rendered, and this has not only been the practice since the first railroad ever ran its first train to the present time, but the practice has been put into the form of an agreement between the ORT and the carrier. Award 615 presented the actual facts and conditions that have existed throughout the years of the railroad industry."

• • •

"As further proof of my statement, the Clerks Organization on the MKT property and throughout the United States never claimed that they had any such jurisdiction over clerical work until after the special agreement was negotiated on this Missouri-Pacific in Texas by the Clerks Organization in 1940. Two years after that time, or in 1942, the General Chairman of the Clerks Organization on the MKT Lines presented a similar document to the management of the MKT and several times since that date which was rejected, and which proves conclusively that if the Clerks had in mind that they had negotiated any such rule in 1925, or subsequent thereto, they would have insisted that it be applied to their Organization. It took them 18 years to figure out a dastardly scheme of evading a jurisdictional dispute to find some referee that would reverse Award 615."

In the 15-page memorandum attached to his letter, Thompson said in part:

"I hold that the National Railroad Adjustment Board had no right to assume control and jurisdiction over this dispute without all parties to the dispute being heard."

• • •

"What Referee Douglas did, in Award 3932 and companion Awards (3933 and 3934) was exactly what we predicted, under date of July 9, 1943 and I quote our statement:

"'The Clerks Organization, after the West Memphis Award 423, seeing an opportunity of extending their jurisdiction and raiding the Telegraphers Organization all over the country, proceeded to instigate claims of the same character that Mr. Pickett has instigated here'."

• • •

"The Board . . . imposed an obligation upon the carrier, which is detrimental to the interests of other employes and the public, and creates a condition that might place The Order of Railroad Telegraphers into taking a strike vote to maintain our contractual relations with the carrier, which is chargeable directly to the National Railroad Adjustment Board for its interference instead of performing the functions allocated to the Board under the law."

• • •

"Regardless of the outcome, we are in a position to seek redress against the carrier if there is any action on their part to remove any of the remaining positions named in the above awards from our Schedule Agreement."

128. On August 11, 1948, and again on September 9, 1948, Thompson wrote Winkel protesting the action of MKT in abolishing positions of Telegrapher-Cashier at Lockhart, Texas; Telegrapher-Cashier at Chanute, Kansas; and Telegrapher-Cashier at Altus, Oklahoma. In his letter of August 11, Thompson said in part:

". . we respectfully protest against taking the work away from our organization and giving it to the clerks as we have negotiated for these positions since 1918 and the positions belong to us through negotiated agreements."

In his letter of September 9, Thompson said in part:

"We challenge the right of the carrier, or the Adjustment Board, to now make retroactive any condition that existed prior to the enactment of the amended

Railway Labor Act of 1934, which would destroy, or take away, any position or work that has been delegated to our craft through due and regular process of contract with the carrier."

"Unless you can reverse your position and cancel your instructions, and restore our men to the positions we have negotiated with you, we will be compelled to refer the matter to the National Railroad Adjustment Board."

129. Winkel informed Thompson by letter dated September 17, 1948, that he could not reverse his position because MKT was "under compulsion of Awards 3932, 3933, and 3934."

130. On January 17, 1949, ORT submitted to the Board in Docket TE-4540, the following claims against MKT:

[*Disputes Raised by Railroad Telegraphers*]

"(1) That the Carrier violated and continues to violate the terms of the Telegraphers' Agreement when, on August 25, 1948, it declared the position of Telegrapher-Cashier at Lockhart, Texas, abolished and transferred the work of the position to an employe not under the Telegraphers' Agreement.

"(2) That the position of Telegrapher-Cashier shall be restored to the Telegraphers' Agreement and the former incumbent of that position restored thereto and compensated for any loss of wages and expenses incurred by reason of the violative act of the Carrier; and

"(3) That all other employes under the Telegraphers' Agreement improperly displaced from their positions as a result of this violative act of the Carrier shall be restored to their former positions and compensated for any loss of wages and expenses incurred thereby."

131. The documents filed by ORT in Docket TE-4540, including its ex parte submission, showed that BRC and

an employe of MKT subject to the collective agreement between MKT and BRC were involved in the dispute and that, in order to comply with an award in favor of ORT, MKT would be required to take clerical work away from an employee subject to BRC's agreement and to assign the same clerical work to an employee subject to ORT's agreement.

132. In its "Statement of Facts" in Docket TE-4540, MKT reminded the Board that it transferred clerical work from the Telegrapher-Cashier to the General Clerk at Lockhart, Texas, in partial compliance with Award 3933.

133. Under the heading "Position of Carrier" in its submission in Docket TE-4540, MKT asserted that BRC had a direct and substantial interest and should be made a party; that such action was required by the decisions of the United States Court of Appeals for the Seventh Circuit in *Nord* v. *Griffin*, 86 F. 2d 481, and *Hunter* v. *Atchison, T. & S. F. Ry. Co.*, 171 F. 2d 594 [15 Labor Cases ¶ 64,878]; and that no legal, binding, and enforceable award and order could be made in Docket TE-4540 unless and until BRC is given due and timely notice and an opportunity to appear and be heard in accordance with due process of law. MKT also requested the Board to give BRC such notice and opportunity to appear and be heard, to the end that a final and complete determination might be made of the rights of the parties.

134. Replying to MKT's argument, ORT said in part:

> "If we had been permitted by this Board to intervene in Dockets CL-2752 and companion dockets, Award 2651 and companion awards, and Docket CL-3715 and companion dockets, Award 3933 and companion awards, we would have shown conclusively that the telegrapher-cashier's position was duly negotiated between this carrier and the employes, represented by The Order of Railroad Telegraphers, October 1, 1916,

and has been continuously in effect since that date, and was continued in the present Agreement, dated September 1, 1947 and was negotiated under the Railway Labor Act * * *."

135. Notice of the hearing in Docket TE-4540 was given to ORT and MKT, but no notice was given to BRC or to its officers, agents, representatives, or members, or to the person holding the position of General Clerk at Lockhart, Texas. ORT and MKT waived oral hearing and submitted the case on written documents.

136. On February 28, 1950, the Board, with Referee Mortimer Stone sitting as a member thereof, rendered Award 4735 in Docket TE-4540, sustaining all claims of ORT. On the same date, the Board issued an Order directing MKT to make the award effective and to pay, on or before May 1, 1950, all sums of money due under that award.

136½.[1] Award 4735 was rendered, sustaining the claims of ORT, for the reasons stated in Award 4734, which involved ORT and the Missouri Pacific Lines in Texas and Louisiana. Award 4734 has been held illegal and void by United States District Judge Roy W. Harper in his Memorandum Opinion dated June 16, 1954, in Civil Action No. 8447(3), entitled "*The Order of Railroad Telegraphers* v. *New Orleans, Texas & Mexico Railway Company, et al*" [26 Labor Cases ¶ 68,622], in the United States District Court for the Eastern District of Missouri, Eastern Division, because Award 4734 "was rendered by said Board without giving members of BRS (BRC) notice, and without the members of BRS (BRC) having an opportunity in the hearing to be heard before the National Railroad Adjustment Board." ORT has appealed.

1. Finding 136½ was added by a supplement, approved and entered September 4, 1954.

137. The Board issued Award 4735, and the Order accompanying that Award, without giving BRC and the General Clerk at Lockhart, Texas, an opportunity to be heard in Docket TE-4540.

138. ORT made written and oral demands upon MKT to comply with Award 4735 and the Order accompanying it but MKT refused.

139. On April 28, 1950, MKT filed with the Board a motion to set aside Award 4735 and the accompanying Order and to grant a rehearing in Docket TE-4540. In that motion, MKT prayed that the Board give lawful notice of such rehearing to BRC and to the General Clerk at Lockhart, Texas. The Board did not give such notice; and, with Referee Stone sitting as a member, denied MKT's motion on June 9, 1950. Referee Stone reduced to writing his reasons for denying that motion. After referring to Awards 3932, 3933, and 3934, Referee Stone said in part:

> "By denying the application to set aside the present Award, No. 4735, we permit that Award to become final and on an equal basis with the Awards to the Clerks and give both Brotherhoods (ORT and BRC) like standing in any consideration of harmonizing or adjusting those Awards . . ."

140. To comply with Award 4735 and the accompanying Order in Docket TE-4540, MKT would be required to restore the position of Telegrapher-Cashier at Lockhart, Texas, under ORT's agreement, and to reassign to that position the clerical work which, in partial compliance with Award 3933, MKT transferred to the newly created position of General Clerk under BRC's agreement. In that event the position of General Clerk would be abolished, and a dispute would be created with BRC.

141. ORT has threatened to file against MKT claims similar to those in Docket TE-4540, which resulted in

Award 4735, if MKT transfers other clerical work from positions under ORT's agreement to positions under BRC's agreement in compliance with Awards 3932, 3933, and 3934.

142. In March 1949, MKT found it necessary to reduce the number of its employees performing clerical work at Coffeyville, Kansas. Because of BRC Awards 3932, 3933, and 3934, MKT concluded to abolish the position of third-trick Telegrapher-Clerk under ORT's agreement instead of abolishing a clerical position under BRC's agreement. Such action was taken on March 11, 1949 and the bulk of the clerical work previously performed by the third-trick Telegrapher-Clerk was then assigned to a night clerk of MKT who is subject to BRC's agreement.

143. Practically all the telegraphing work which had been performed by the third-trick Telegrapher-Clerk at Coffeyville, Kansas, before that position was abolished, as described in Finding 142, was transferred to two remaining positions of Telegrapher-Clerk at Coffeyville. The only telegraphing work transferred from this abolished position to telegraph operators at Coffeyville Tower was work thereafter performed in about 30 minutes of an 8-hour assignment. The telegraph operators at Coffeyville Tower had performed telegraphing work for MKT for many years before this additional work was assigned to them. Under an operating agreement between MKT and the Missouri Pacific Railroad Company, the telegraph operators at Coffeyville Tower perform joint service for those companies. They are carried on the payroll of the Missouri Pacific and MKT reimburses Missouri Pacific for its proportion of their salaries. Prior to the filing of its submission in Docket TE-4953, ORT had not complained about the telegraph operators at Coffeyville Tower performing telegraphing service for MKT. ORT has never complained of the performance of telegraphing service for MKT by tele-

graph operators of other companies who perform joint service for MKT and such other companies under joint operating agreements at other points on MKT lines.

144. ORT complained to MKT about the transfer of clerical work at Coffeyville, Kansas, described in Finding 142, but ORT made no complaint to MKT about the transfer of telegraphing work, described in Finding 143. Under the rules of the Board, a claim cannot be considered by the Board unless it has first been presented to and declined by the railroad.

145. In December, 1949, ORT submitted to the Board, in Docket TE-4953, the following claim against MKT:

> "(1) That the Carrier violated the terms of the Telegraphers' Agreement when, on March 11, 1949, it discontinued the third trick telegrapher-clerk position at Coffeyville, Kansas, regularly assigned to W. Atwill, and transferred the work of the position to an employee not under the Telegraphers' Agreement; and
>
> "(2) That the position of third trick telegrapher-clerk, the duties of which were not in fact abolished, shall be restored and W. Atwill, the regularly assigned incumbent thereof, shall be restored to his former position, and all employees who were displaced as a result of this improper act of the Carrier shall be returned to their former positions and be reimbursed for all wage loss suffered retroactive to the date improperly displaced."

146. ORT's ex parte submission in TE-4953, and other documents filed by ORT in that docket, showed that BRC and an employee of MKT subject to the collective agreement between MKT and BRC were involved in the dispute and that, in order to comply with an award in favor of ORT, MKT would be required to take clerical work away from an employee subject to BRC's agreement and to assign the same clerical work to an employee subject to ORT's agreement.

147. Referee Jay S. Parker sat with the Board in Docket TE-4953. In hearings before a referee, one labor member of the Board represents the claimant and the labor members of the Board; and one carrier member of the Board represents the carrier and the carrier members of the Board. In this dispute, A. R. Ferris was the labor representative and J. E. Kemp was the carrier representative. In such representative capacity, J. E. Kemp submitted a written statement to Referee Parker in which he said:

> "The issue in this dispute is—when it becomes necessary to abolish one of two positions, which one of the two should be abolished—a position under the Telegraphers' Agreement or a position under the Clerks' Agreement?
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> * * *
>
> "The following is to be considered as supplementing the Carrier's presentation.
>
> "Employees cite numerous Board awards . . . in support of their position. However, none of these appear applicable in this dispute which involves the jurisdictional dispute between the Telegraphers' Organization and the Clerks' Organization with respect to the performance of clerical work by Telegraphers."

In the same written statement, Kemp quoted from awards of the Board, including Award 615, which dealt at length with jurisdictional disputes between ORT and BRC relating to the performance of station clerical work.

147½[1] The opinion of the Board in Award 5014 contains the following statements:

> "The Carrier (MKT) denies the first portion of the Employes' assertion but we note that in one of its submissions in Award 3932 it states that for 48 years on its railroad this character of work (clerical) had been performed under the Telegraphers' Agreement."
>
> * * *

1. Finding 147½ was added by a supplement, approved and entered September 4, 1954.

"In any event it appears from admissions made by the Carrier of record that when it discontinued the position it assigned all of its then existing clerical duties to an employe covered by the Clerks' Agreement * * *."

148. The Board gave no notice of the filing of ORT's claim in Docket TE-4953 and gave no notice of any proceedings in that docket to BRC or to its officers, agents, representatives or members, or to the employee of MKT holding the night clerical position at Coffeyville, Kansas.

149. ORT and MKT waived oral hearing in Docket TE-4953 and the Board, with Referee Parker, sitting as a member, on August 10, 1950, issued Award 5014 sustaining ORT's claim and on the same date entered an Order directing MKT to make the award effective.

150. In support of Award 5014, the Board cited several awards, including Award 4735, the enforcement of which this Court temporarily enjoined on April 10, 1952, and the enforcement of which MKT now asks the Court to enjoin permanently.

151. The Board issued Award 5014, and the Order accompanying that award, without giving BRC and the employee of MKT holding the night clerical position at Coffeyville, Kansas, an opportunity to be heard in Docket TE-4953.

152. MKT has not complied with Award 5014 and the accompanying Order; to do so, MKT would be required to take clerical work away from an employee under BRC's agreement and to assign the same clerical work to a Telegrapher-Clerk under ORT's agreement. In that event, a dispute would be created with BRC.

153. The employee of MKT holding the position of General Clerk at Lockhart, Texas, and the employee of MKT holding the night clerical position at Coffeyville,

Kansas, are members of the craft or class represented by BRC and are subject to the collective agreement between MKT and BRC.

154. The employees of MKT who held the positions of Telegrapher-Cashier at Altus, Oklahoma; Telegrapher-Cashier at Chanute, Kansas; and Telegrapher-Cashier at Lockhart, Texas, when those positions were abolished by MKT in partial compliance with Awards 3932 and 3933 and the Orders accompanying those awards, were members of the craft or class represented by ORT and were subject to the collective agreement between MKT and ORT.

155. The employees of MKT holding the positions of Agent-Yardmaster, and Telegrapher-Clerk at Altus, Oklahoma; Agent, and Telegrapher-Clerk at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; Agent-Telegrapher at Lockhart, Texas; Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas; Agent, and Telegrapher-Clerk at Atoka, Oklahoma, are members of the class or craft represented by ORT and are subject to the collective agreement between MKT and ORT.

156. In disputes such as those involved in Awards 3932, 3933, 3934, 4735, and 5014, it is the settled custom and practice of the Board:

(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim.

(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board.

(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim.

(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing.

(e) Not to permit anyone to intervene.

(f) Not to recognize anyone as a party to a pro-

ceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so.

157. The settled custom and practice of the Board, described in Finding 156, is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard.

158. The position of the labor members of the Board, described in Finding 157, is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor Executives Association and who select, control and discipline the labor members of the Board.

159. The carrier members of the Board are opposed to its settled custom and practice described in Finding 156. It is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board.

160. The conflicting positions of the labor members and of the carrier members of the Board make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees.

161. Referees appointed to break deadlocks as to notice and hearing are divided in their opinions. Some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given.

162. These divergent views and actions of the Board members and the referees, described in Findings 158 to 161, have produced an administrative deadlock, stalemate

and frustration on the Board. The carrier members have asked for judicial guidance.

163. Awards 3932, 3933, 3934, and 4735, and the accompanying Orders, and the conflicting demands made by BRC and ORT upon MKT that it comply with those awards and orders, have created a state of unrest among the employees of MKT who are represented by BRC and ORT, and those awards and orders have disrupted the peaceful relations between MKT and those employees.

164.[1] To comply with Awards 3932, 3933, 3934, 4735, and 5014, MKT would be required to expend yearly the following sums of money:

(a) Under BRC's interpretation of Awards 3932, 3933, and 3934.....$547,200.00
(b) Under Award 3932, as rendered...$ 7,680.00
(c) Under Award 3933, as rendered..$ 7,680.00
(d) Under Award 3934, as rendered..$ 7,680.00
(e) Under Award 4735, as rendered..$ 3,850.00
(f) Under Award 5014, as rendered..$ 4,345.00

165. MKT is confronted with the following multiplicity of actions as a result of Awards 3933, 3934, 4735, and 5014, and the Orders accompanying those awards:

(a) To enforce Award 3933 and the accompanying Order:

Civil Action No. 7179(3), entitled "System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. J. Pickett, General Chairman v. Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas", pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

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1. Finding 164 reads as amended by a supplement, approved and entered September 4, 1954.

(b) To enforce Award 3934 and the accompanying Order:

> Civil Action No. 7227(3), entitled "System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. J. Pickett, General Chairman, v. Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas", pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

(c) To enforce Award 4735 and the accompanying Order:

> Civil Action No. 4572, entitled "The Order of Railroad Telegraphers v. Missouri-Kansas-Texas Railroad Company of Texas", pending in the District Court of the United States for the Northern District of Texas, Dallas Division.

(d) To enforce Award 5014 and the accompanying Order:

> Civil Action No. 8708(2), entitled "The Order of Railroad Telegraphers v. Missouri-Kansas-Texas Railroad Company", in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

By Order entered June 18, 1952, Civil Action No. 4572 was dismissed without prejudice to its being reinstated upon application made by The Order of Railroad Telegraphers within 60 days after it ceases to be enjoined from prosecuting a suit to enforce Award 4735.

[1] In Civil Action No. 8708(2), the District Court entered Orders denying MKT's motion to stay proceedings, motion for a continuance, and motion to dismiss for failure of ORT to state a claim upon which relief can be granted and for failure of ORT to make BRC a party to the court

1. The last two paragraphs of Finding 165 were added by a supplement, approved and entered September 4, 1954.

action. MKT cannot appeal from said Orders until after a trial of the case on the merits and in which BRC would not participate. No other action in the case, except setting it for a pre-trial conference in May 1953, has been taken by the District Court.

No action has been taken by the District Court in Civil Actions Nos. 7179(3) and 7227(3) except to pass or continue those cases pending final judgment in Civil Action 50 C 684.

166. No suit has been filed to enforce Award 3932.

167. The System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, named as plaintiff in Civil Actions Nos. 7179(3) and 7227(3), described in Finding 165, is a subordinate unit of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

168. Neither the Board nor its members are parties to the suits filed against MKT, described in Finding 165, and they cannot be made parties because the headquarters of the Board is in the City of Chicago, Cook County, Illinois, and the members of the Board reside in the State of Illinois, within the jurisdiction of this Court.

[*Available Remedies*]

169. In this action, a judgment could be rendered directing and requiring the Board and its members,—

(a) To consolidate the proceedings in Dockets CL-3714, CL-3715, CL-3716, TE-4540, and E-4953 for a single hearing.

(b) To give all parties, persons, employees and labor organizations involved in said disputes notice of such hearing and an opportunity to be heard.

(c) To consider in such consolidated proceeding

the agreement between MKT and BRC, the agreement between MKT and ORT, and the custom and practice under those agreements.

No such relief could be granted in suits filed against MKT, described in Finding 165.

170. The question for the Board's decision, in Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953 (Awards 3932, 3933, 3934, 4735 and 5014) is whether the employees of MKT who are subject to BRC's agreement, or the employees of MKT who are subject to ORT's agreement, have the right to perform station clerical work. A decision in any of the suits filed against MKT, described in Finding 165 might hamper and prevent the Board from reaching an initial and independent decision on this question.

171. In Civil Action No. 7179(3) and Civil Action No. 7227(3) pending in St. Louis, Missouri, described in Finding 165, the Court would be required to decide whether the collective agreement between MKT and BRC, or the custom and practice under that agreement, entitles employees of MKT who are subject to that agreement, to perform station clerical work. That question should be decided by the Board. A decision in Civil Action No. 7179(3) or a decision in Civil Action No. 7227(3) might hamper and prevent the Board from reaching an initial and independent decision on this question.

172. In Civil Action No. 4572 pending in Dallas, Texas, and in Civil Action No. 8708(2) pending in St. Louis, Missouri, described in Finding 165, the Court would be required to decide whether the collective agreement between MKT and ORT, or the custom and practice under that agreement, entitles employees of MKT who are subject to that agreement, to perform station clerical work. That question should be decided by the Board. A decision in Civil Action No. 4572 or a decision in Civil Action No.

8708(2) might hamper and prevent the Board from reaching an initial and independent decision on this question.

173. Both plaintiffs, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, are parties to the collective agreement with ORT.

Missouri-Kansas-Texas Railroad Company is not a party to Civil Action No. 4572, described in Finding 165, pending in Dallas, Texas.

Missouri-Kansas-Texas Railroad Company of Texas is not a party to Civil Action No. 8708(2), described in Finding 165, pending in St. Louis, Missouri.

In Civil Action No. 4572, the Court would be required to construe and apply the collective agreement between ORT and MKT. A judgment in that case would not be binding upon Missouri-Kansas-Texas Railroad Company.

In Civil Action No. 8708(2), the Court would be required to construe and apply the collective agreement between ORT and MKT. A judgment in that case would not be binding upon Missouri-Kansas-Texas Railroad Company of Texas.

A judgment for ORT in Civil Action No. 4572 would impair, impede and hamper the orderly application of the collective agreement between ORT and Missouri-Kansas-Texas Railroad Company, and would be productive of more disputes between ORT and that Company.

A judgment for ORT in Civil Action No. 8708(2) would impair, impede and hamper the orderly application of the collective agreement between ORT and Missouri-Kansas-Texas Railroad Company of Texas, and would be productive of more disputes between ORT and that Company.

174. The possibility of a conflict between the decision in Civil Action No. 4572 pending in Dallas, Texas, within the jurisdiction of the United States Court of Appeals for

the Fifth Circuit, and the decision in Civil Action No. 8708(2) pending in St. Louis, Missouri, within the jurisdiction of the United States Court of Appeals for the Eighth Circuit would be avoided by permitting the Board, in a lawful proceeding, to interpret and apply the collective agreement between plaintiffs and ORT.

175. No labor member of the Board would join the carrier members of the Board in voting to reopen and consolidate Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, to hear the disputes in those dockets in one proceeding, and to give notice of such hearing and an opportunity to be heard to ORT, BRC, and the persons holding the positions which would be affected by an award of the Board.

176. The settled custom and practice of the Board, the conflicting positions of its members, and the divergent views and actions of its members and referees, set forth in Findings 156 to 162, defeat the declared purpose of the Railway Labor Act "to provide for the prompt and orderly settlement of all disputes."

177. MKT has no adequate remedy at law.

178. MKT will suffer irreparable injury, loss, and damage unless the injunctive relief sought by MKT is granted.

Conclusions of Law.

Upon the foregoing Findings of Fact, I conclude:

1. This action arises under the Constitution and laws of the United States, and the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs (28 U. S. C. A. § 1331). It also arises under an Act of Congress regulating commerce (28 U. S. C. A. § 1337).

2. The Court has jurisdiction of the parties and of the subject matter of this action, and venue is properly in this Court.

3. The complaint, as amended, states a cause of action upon which relief can be granted to MKT.

4. BRC and ORT are unincorporated associations and are properly sued in this action in their common names.

5. The subject matter of this action is a proper subject of a class action.

6. The members of BRC constitute a class; they have a common interest in the facts and law of this case; and they are so numerous as to make it impracticable to bring them all before the Court.

7. The members of ORT constitute a class; they have a common interest in the facts and law of this case; and they are so numerous as to make it impracticable to bring them all before the Court.

8. G. B. Goble is a member of BRC and will fairly insure the adequate representation in this cause of all members of BRC constituting a class.

9. H. C. Kearby, R. B. Boyington, and J. W. Whitehouse are members of ORT and will fairly insure the adequate representation in this cause of all members of ORT constituting a class.

10. BRC and ORT will fairly insure the adequate representation in this cause of all members of the BRC and ORT classes.

11. G. B. Goble is such a person as could reasonably be expected to give notice of this action to BRC and to its Grand Lodge, Subordinate Units, System Boards of Adjustment, Terminal Boards of Adjustment, and Lodges.

12. H. C. Kearby, R. B. Boyington, and J. W. Whitehouse, are such persons as could reasonably be expected

to give notice of this action to ORT, and to its Grand Division, Subordinate Divisions, System Divisions, Local Divisions, and Local Boards of Adjustment.

13. BRC was the claimant before the Board in Dockets CL-3714, CL-3715, and CL-3716, in which dockets Awards 3932, 3933, and 3934 were rendered.

14. The System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, is a subordinate unit of BRC and is not a proper, necessary, or indispensable party to this action.

15. ORT was the claimant before the Board in Dockets TE-4540 and TE-4953, in which dockets Awards 4735 and 5014 were rendered.

16. James M. Douglas, Mortimer Stone, and Jay S. Parker, the Referees in Awards 3932, 3933, 3934, 4735, and 5014, are not proper, necessary, or indispensable parties to this action.

17. This case does not involve a labor dispute within the meaning of the Norris-LaGuardia Act, and this Court has not been deprived by that Act of jurisdiction to invalidate the awards and orders involved in this case.

18. Section 3 First (p) of the Railway Labor Act, providing for judicial enforcement of awards of the Board, does not limit the previously existing jurisdiction of this Court.

19. ORT and the employees of MKT holding the positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma, were involved in the dispute submitted to the Board by BRC in Docket CL-3714, which resulted in Award 3932.

20. ORT and the employees of MKT holding the posi-

tions of Agent and Telegrapher-Cashier at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; Agent-Telegrapher, and Telegrapher-Cashier at Lockhart, Texas; Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas, were involved in the dispute submitted to the Board by BRC in Docket CL-3715, which resulted in Award 3933.

21. ORT and the employees of MKT holding the positions of Agent, and Telegrapher-Clerk at Atoka, Oklahoma, were involved in the dispute submitted to the Board in Docket CL-3716, which resulted in Award 3934.

22. BRC and the employee of MKT holding the position of General Clerk at Lockhart, Texas, were involved in the dispute submitted to the Board in Docket TE-4540, which resulted in Award 4735.

23. BRC and the employee of MKT holding the night clerical position at Coffeyville, Kansas, were involved in the dispute submitted to the Board by ORT in Docket TE-4953, which resulted in Award 5014.

24. It was the duty of the Board in Docket CL-3714 to give ORT and the employees of MKT holding the positions of Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk, at Altus, Oklahoma, notice of the filing by BRC of the claim in Docket CL-3714; to permit ORT and each of those employees to file papers and other documents; to give ORT and each of those employees notice of the hearing; and to give ORT and each of those employees an opportunity to be heard.

25. It was the duty of the Board in Docket CL-3715 to give ORT and the employees of MKT holding the positions of Agent, and Telegrapher-Cashier at Chanute, Kan-

sas; Agent-Telegrapher at Junction City, Kansas; Agent-Telegrapher, and Telegrapher-Cashier at Lockhart, Texas; Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas, notice of the filing by BRC of the claim in Docket CL-3715; to permit ORT and each of those employees to file papers and other documents; to give ORT and each of those employees notice of the hearing; and to give ORT and each of those employees an opportunity to be heard.

26. It was the duty of the Board in Docket CL-3716 to give ORT and the employees of MKT holding the positions of Agent, and Telegrapher-Clerk at Atoka, Oklahoma, notice of the filing by BRC of the claim in Docket CL-3716; to permit ORT and each of those employees to file papers and other documents; to give ORT and each of those employees notice of the hearing; and to give ORT and each of those employees an opportunity to be heard.

27. It was the duty of the Board in Docket TE-4540 to give BRC and the employee of MKT holding the position of General Clerk at Lockhart, Texas, notice of the filing by ORT of the claim in Docket TE-4540; to permit BRC and that employee to file papers and other documents; to give BRC and that employee notice of a hearing; and to give BRC and that employee an opportunity to be heard.

28. It was the duty of the Board in Docket TE-4953 to give BRC and the employee of MKT holding the night clerical position at Coffeyville, Kansas, notice of the filing by ORT of the claim in Docket TE-4953; to permit BRC and that employee to file papers and other documents; to give BRC and that employee notice of a hearing; and to give BRC and that employee an opportunity to be heard.

29. It was the duty of the Board to consolidate Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, and to hear all contentions as one dispute.

30. It was the duty of the Board in Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953 to consider the collective agreement between BRC and MKT, and the collective agreement between ORT and MKT, in light of each other, and usage, practice, and custom thereunder.

31. BRC's ex parte submission in Docket CL-3714 and other documents filed by BRC in that docket were sufficient to put the Board on notice that ORT and employees of MKT subject to the collective agreement between MKT and ORT were involved in the dispute in Docket CL-3714 and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

32. BRC's ex parte submission in Docket CL-3715, and other documents filed by BRC in that docket, were sufficient to put the Board on notice that ORT and employees of MKT subject to the collective agreement between MKT and ORT were involved in the dispute in Docket CL-3715 and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

33. BRC's ex parte submission in Docket CL-3716, and other documents filed by BRC in that docket, were sufficient to put the Board on notice that ORT and employees of MKT subject to the collective agreement between MKT

and ORT were involved in the dispute in Docket CL-3716 and that, in order to comply with an award in favor of BRC, MKT would be required to take clerical work away from employees subject to ORT's agreement and to assign the same clerical work to employees subject to BRC's agreement.

34. The documents filed by ORT in Docket TE-4540, including its ex parte submission, were sufficient to put the Board on notice that an employee of MKT subject to the collective agreement between MKT and BRC was involved in the dispute in Docket TE-4540 and that, in order to comply with an award in favor of ORT, MKT would be required to take clerical work away from an employee subject to BRC's agreement and to assign the same clerical work to an employee subject to ORT's agreement.

35. ORT's ex parte submission in Docket TE-4953 and other documents filed by ORT in that docket, and the written statement furnished to Referee J. S. Parker by J. E. Kemp, a carrier member of the Board, were sufficient to put the Board on notice that BRC and an employee of MKT subject to the collective agreement between MKT and BRC were involved in the dispute in Docket TE-4953 and that, in order to comply with an award in favor of ORT, MKT would be required to take clerical work away from an employee subject to BRC's agreement to assign the same clerical work to an employee subject to ORT's agreement. The opinion of the Board in Award 5014 shows that the Board, including Referee Parker, was aware of these facts.[1]

36. The Board did not perform the duties set forth in Conclusions of Law 24 to 28.

37. Awards 3932, 3933, 3934, 4735, and 5014, and the Orders accompanying those awards, are null and void.

1. The last sentence of Conclusion of Law 35 was added by a supplement, approved and entered September 4, 1954.

38. By voiding Awards 3932, 3933, 3934, 4735, and 5014, and the accompanying orders, the Court leaves Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, and all employees and labor organizations involved in the disputes submitted to the Board in those dockets, in the same position they occupied before the awards and orders were rendered.

39. In failing to perform the duties set forth in Conclusions of Law 24 to 28, the Board denied MKT the due process of law to which MKT was, and is, entitled under the Fifth Amendment to the Constitution of the United States.

40. In issuing Awards 3932, 3933, 3934, 4735, and 5014, and the Orders accompanying those awards, without first having performed the duties set forth in Conclusions of Law 24 to 28, the Board denied MKT the due process of law to which it was entitled under the Fifth Amendment to the Constitution of the United States.

41. To require MKT to comply with Awards 3932, 3933, 3934, 4735, and 5014, and the Orders accompanying those awards, or to comply with any of those awards and orders, would deprive MKT of its property rights without due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

42. The Board is required to perform the duties described in Conclusions of Law 24 to 28, whether or not its rules of procedure provide for the performance of those duties.

43. The Board has no power to issue an award and order until it has performed its duty to give notice and opportunity to be heard to all employees and labor organizations involved in a dispute.

44. Actual knowledge by anyone of the pendency of a proceeding before the Board, or of a hearing to be held in

such proceeding, does not excuse the Board from performing its duty as to notice and hearing.

45. MKT cannot be deprived of the right to have the Board perform its duty as to notice and hearing because employees or labor organizations involved in the dispute may actually know that a proceeding is pending before the Board or may know when a hearing will be held.

46. MKT was, and is, entitled to have the Board perform the duties set forth in Conclusions of Law 24 to 28.

47. MKT has the right to attack the validity of Awards 3932, 3933, 3934, 4735, and 5014, and the accompanying orders, on the ground that the Board did not give notice and an opportunity to be heard to employees or labor organizations involved in the disputes.

48. MKT's partial compliance with void Awards 3932 and 3933, and the accompanying Orders was induced by BRC's insistence, demands, and coercive conduct; and MKT's partial compliance which implemented those void awards and orders was void and of no legal effect.

49. MKT has no adequate remedy at law.

50. MKT will suffer irreparable injury, loss, and damage unless the injunctive relief sought by MKT is granted.

51. BRC and its Subordinate Units, System Boards of Adjustment, System Committees, District Boards of Adjustment, Terminal Boards of Adjustment, Lodges, members, officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, should be enjoined and restrained from prosecuting Civil Action No. 7179(3) and Civil Action No. 7227(3), described in Finding 165, and from attempting or threatening to enforce compliance with Awards 3932, 3933, or 3934, and the Orders accompanying those awards.

52. ORT and its Subordinate Divisions, System Divi-

sions, Local Divisions, Local Boards of Adjustment, members, officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, should be enjoined and restrained from prosecuting Civil Action No. 4572 and Civil Action No. 8708(2), described in Finding 165, and from attempting or threatening to enforce compliance with Awards 4735 and 5014, and the Orders accompanying those awards.

53. The relief sought by MKT is in the nature of mandamus but it can be granted under the general equity powers of the court.

54. A mandatory injunction should be issued commanding the Board and its members,—

(a) To reopen Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953;

(b) To consolidate Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, for a single hearing, and to hold such hearing;

*(c) To give notice of such consolidation and of such

* By order entered October 20, 1954 paragraph (c) of conclusion of law 54 was corrected to read as follows:

"(c) To give notice of such consolidation and of such hearing to Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas; to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to The Order of Railroad Telegraphers; to the employees of Missouri-Kansas-Texas Railroad Company who held the positions of Telegrapher-Cashier at Altus, Oklahoma, and Telegrapher-Cashier at Chanute, Kansas; when those positions were abolished pursuant to Awards 3932 and 3933, and the Orders accompanying those awards; to the employee of Missouri-Kansas-Texas Railroad Company of Texas who held the position of Telegrapher-Cashier at Lockhart, Texas, when that position was abolished pursuant to Award 3933 and the Order accompanying that award; to the employees of Missouri-Kansas-Texas Railroad Company holding the following positions: Agent-Yardmaster, and Telegrapher-Clerk at Altus, Oklahoma; Agent and Telegrapher-Clerk at Atoka, Oklahoma; Agent, and Telegrapher-

hearing to Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas; to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; to The Order of Railroad Telegraphers; to the employees of Missouri-Kansas-Texas Railroad Company who held the positions of Telegrapher-Cashier at Altus, Oklahoma, and Telegrapher-Cashier at Chanute, Kansas, when those positions were abolished pursuant to Awards 3932 and 3933, and the Orders accompanying those awards; to the employee of Missouri-Kansas-Texas Railroad Company of Texas who held the position of Telegrapher-Cashier at Lockhart, Texas, when that position was abolished pursuant to Award 3933 and the Order accompanying that award; to the employees of Missouri-Kansas-Texas Railroad Company holding the following positions: Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma; Agent and Telegrapher-Clerk at Atoka, Oklahoma; Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; night clerk at Coffeyville, Kansas; to the employees of Missouri-Kansas-Texas Railroad Company of Texas holding the following positions: Agent-Telegrapher, Telegrapher-Cashier, and General Clerk, at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas;

(d) To permit plaintiffs, the labor organizations, and the employees specified in paragraph (c) of this conclusion of law to file papers and other documents in consolidated Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953;

Clerk at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; night clerk at Coffeyville, Kansas; to the employees of Missouri-Kansas-Texas Railroad Company of Texas holding the following positions: Agent-Telegrapher, and General Clerk, at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas;"

(e) To give plaintiffs, the labor organizations, and the employees specified in paragraph (c) of this conclusion of law an opportunity to be heard in the consolidated hearing; and

(f) To consider the agreement between plaintiffs and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, the agreement between plaintiffs and The Order of Railroad Telegraphers, and the custom and practice under those agreements, in making an award and order in consolidated Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953.

Enter:

JOHN P. BARNES,
United States District Judge.

Chicago, Illinois,
September 2, 1954.

Final Decree.

This cause came on to be heard on December 14, 1953:

And came plaintiffs Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas by their attorneys:

And came defendants G. B. Goble and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes by their attorneys;

And came defendants H. C. Kearby, J. W. Whitehouse, R. B. Boyington, and The Order of Railroad Telegraphers by their attorneys;

And came defendants C. P. Dugan, J. E. Kemp, R. M. Butler, W. H. Castle, and E. T. Horsley, carrier members of the National Railroad Adjustment Board, Third Division, by their attorneys;

And came not defendant National Railroad Adjustment Board, Third Division, though duly cited to appear;

And came not defendants J. H. Sylvester, Gerald Orndorff, Roger Sarchet, C. R. Barnes, and J. W. Whitehouse, labor members of the National Railroad Adjustment Board, Third Division, though duly cited to appear;

And came not the United States of America, though duly served as required by law;

And the Court having heard the evidence, considered the briefs, and heard the oral arguments of counsel for the appearing parties;

And it appearing to the Court that the National Railroad Adjustment Board, Third Division, issued Awards 3932, 3933, 3934, 4735, and 5014, and the Orders accompanying those awards, in the Board's Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, respectively, without complying with its duty to give due notice and an opportunity to be heard to labor organizations and employees of plaintiffs involved in the disputes in those dockets;

And it appearing to the Court that Awards 3932, 3933, 3934, 4735, and 5014, and the Orders accompanying those awards, are null and void;

And it appearing to the Court that the National Railroad Adjustment Board, Third Division, in issuing said awards and orders, denied to plaintiffs the due process of law to which they were entitled under the Fifth Amendment to the Constitution of the United States;

And it appearing to the Court that plaintiffs, if required to comply with said awards and orders, or any of them, will be deprived of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States;

And it appearing to the Court that defendant Brother-

hood of Railway and Steamship Clerks, Freigh' Handlers, Express and Station Employes is insisting and demanding that plaintiffs comply with Awards 3932, 3933, and 3934, and the Orders accompanying those awards, and is threatening to take punitive action against plaintiffs if they do not comply with such demands;

And it appearing to the Court that defendant The Order of Railroad Telegraphers is insisting and demanding that plaintiffs comply with Awards 4735 and 5014, and the Orders accompanying those awards, and is threatening to take punitive action against plaintiffs if they do not comply with such demands;

And it appearing to the Court that Awards 3933 and 4735, and the Orders accompanying those awards, are conflicting and impossible of compliance because they order plaintiffs to give the same work at the same time to two different employees at Lockhart, Texas;

And it appearing to the Court that defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, acting by and through its System Committee and A. J. Pickett, General Chairman of that Committee, has brought two suits against plaintiffs, Civil Actions Nos. 7179(3) and 7227(3), in the District Court of the United States for the Eastern District of Missouri, Eastern Division, to enforce Awards 3933 and 3934, respectively, and the Orders accompanying those awards;

And it appearing to the Court that defendant The Order of Railroad Telegraphers has brought suit against plaintiff Missouri-Kansas-Texas Railroad Company of Texas, Civil Action No. 4572, in the District Court of the United States for the Northern District of Texas, Dallas Division, to enforce Award 4735 and the Order accompanying that award;

And it appearing to the Court that defendant The Order of Railroad Telegraphers has brought suit against plaintiff Missouri-Kansas-Texas Railroad Company, Civil Action No. 8708(2), in the District Court of the United States for the Eastern District of Missouri, Eastern Division, to enforce Award 5014 and the Order accompanying that award;

And it appearing to the Court that plaintiffs are confronted with a multiplicity of actions to enforce awards and orders which are null and void;

And it appearing to the Court that defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes has not sued plaintiffs to enforce Award 3932, and the Order accompanying that award, but is threatening to take other action against plaintiffs to compel them to comply with said void award and order;

And it appearing to the Court that neither the National Railroad Adjustment Board, Third Division, nor the members of that Board are parties to said Civil Actions Nos. 7179(3), 7227(3), 4572, and 8708(2), and that the Board and its members cannot be made parties to those actions because the headquarters of the Board is in the City of Chicago, Cook County, Illinois, and the members of the Board reside in the State of Illinois, within the jurisdiction of this Court;

And it appearing to the Court that the question in Awards 3932, 3933, 3934, 4735, and 5014, which the Board should decide in a lawful proceeding, is whether employees of plaintiffs who are subject to an agreement between plaintiffs and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, or employees of plaintiffs who are subject to an agreement between plaintiffs and The Order of Railroad Telegraphers,

have the right to perform station clerical work, and that a decision in any of said actions against plaintiffs might hamper and prevent the Board from reaching an initial and independent decision on this question;

And it appearing to the Court that judgments cannot be rendered in Civil Actions Nos. 7179(3) and 7227(3) until the Court in those actions has determined whether the agreement between plaintiffs and defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, or the custom and practice under that agreement, entitles employees of plaintiffs who are subject to that agreement to perform station clerical work; that such question should be decided by the Board in a lawful proceeding; and that a decision on this question in either of those actions might hamper and prevent the Board from reaching an initial and independent decision on this question;

And it appearing to the Court that judgments cannot be rendered in Civil Actions 4572 and 8708(2) until the Court in those actions has determined whether the agreement between plaintiffs and defendant The Order of Railroad Telegraphers, or the custom and practice under that agreement, entitles employees of plaintiffs who are subject to that agreement to perform station clerical work; that such question should be decided by the Board in a lawful proceeding; and that a decision on this question in either of those actions might hamper and prevent the Board from reaching an initial and independent decision on this question;

And it appearing to the Court that both plaintiffs are parties to an agreement with defendant The Order of Railroad Telegraphers; that plaintiff Missouri-Kansas-Texas Railroad Company is not a party to Civil Action No. 4572 and would not be bound by a judgment in that action; that

plaintiff Missouri-Kansas-Texas Railroad Company of Texas is not a party to Civil Action No. 8708(2) and would not be bound by a judgment in that action; that a judgment for The Order of Railroad Telegraphers in Civil Action No. 4572 would impair, impede, and hamper the orderly application of said agreement by plaintiff Missouri-Kansas-Texas Railroad Company and would be productive of more disputes between that plaintiff and defendant The Order of Railroad Telegraphers; that a judgment for The Order of Railroad Telegraphers in Civil Action No. 8708(2) would impair, impede and hamper the orderly application of said agreement by plaintiff Missouri-Kansas-Texas Railroad Company of Texas and would be productive of more disputes between that plaintiff and defendant The Order of Railroad Telegraphers; and that there is a possibility of conflicting decisions in Civil Actions Nos. 4572 and 8708(2) as to the proper construction and application of said agreement and the effect to be given the custom and practice under said agreement;

And it appearing to the Court that Awards 3932, 3933, 3934, 4735, 5014, and the Orders accompanying those awards, and the demands for the enforcement of those awards and orders, and the suits filed to enforce those awards and orders, have disrupted the peaceful relations between plaintiffs and their employees and have created a state of unrest among said employees;

And it appearing to the Court that plaintiffs have no adequate remedy at law and that they, and each of them, will suffer irreparable injury, loss, and damage, unless an injunction is issued in this cause;

And it appearing to the Court that plaintiffs are entitled to have the Board decide, in a single proceeding of which due notice and an opportunity to be heard are given to all employees and labor organizations involved in the dis-

pute, whether plaintiffs' employees who are subject to plaintiffs' agreement with defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, or plaintiffs' employees who are subject to plaintiffs' agreement with defendant The Order of Railroad Telegraphers, have the right to perform station clerical work;

And it appearing to the Court that it is the settled custom and practice of the Board in disputes of this character:

(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim;

(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board;

(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim;

(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing;

(e) Not to permit anyone to intervene; and

(f) Not to recognize anyone as a party to a proceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so;

And it appearing to the Court that the settled custom and practice of the Board is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard;

And it appearing to the Court that the position of the labor members of the Board is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor

Executives' Association and who select, control and discipline the labor members of the Board;

And it appearing to the Court that the carrier members of the Board are opposed to its settled custom and practices and that it is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board;

And it appearing to the Court that the conflicting positions of the labor members and of the carrier members of the Board make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees;

And it appearing to the Court that referees appointed to break deadlocks as to notice and hearing are divided in their opinions; that some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; and that others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given;

And it appearing to the Court that these divergent views and actions of the Board members and the referees have produced an administrative deadlock, stalemate and frustration on the Board, and that the carrier members have asked for judicial guidance;

And it appearing to the Court that the Board has ignored and continues to ignore repeated court decisions invalidating its awards and orders because no notice and opportunity to be heard were given to employees and labor organizations involved in disputes;

And it appearing to the Court that the purpose of the Railway Labor Act to provide for the prompt and orderly settlement of all disputes is thus defeated;

And it appearing to the Court that Awards 3932, 3933, 3934, and 4735, and the accompanying orders, and the conflicting demands made by BRC and ORT upon MKT that it comply with those awards and orders, have created a state of unrest among the employees of MKT who are represented by BRC and ORT, and that those awards and orders have disrupted the peaceful relations between MKT and those employees;

And it appearing to the Court that a mandatory injunction should be issued, compelling the Board and its members to perform their duty to give notice and an opportunity to be heard to all employees and labor organizations involved in disputes before the Board;

It is therefore ORDERED, ADJUDGED AND DECREED that Awards 3932, 3933, 3934, 4735, and 5014, of the National Railroad Adjustment Board, Third Division, and the Orders accompanying those awards, are null and void;

It is further ORDERED, ADJUDGED AND DECREED that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, its Subordinate Units, System Boards of Adjustment, System Committees, District Boards of Adjustment, Terminal Boards of Adjustment, Lodges, members, officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, be and they are hereby enjoined and restrained from prosecuting against Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, or either of them,

> Civil Action No. 7179(3), entitled "System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. J. Pickett, General Chairman, v. Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas", pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division,

and from prosecuting against Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, or either of them,

> Civil Action No. 7227(3), entitled "System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, A. J. Pickett, General Chairman, v. Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas," pending in the District Court of the United States for the Eastern District of Missouri, Eastern Division,

and from prosecuting any other suit or suits or taking any other action against said Railroad Companies, or either of them, to enforce Awards 3932, 3933, and 3934, and the Orders accompanying those awards, or any of those awards and orders; and from filing with or prosecuting against said Railroad Companies, or either of them, any claim or claims predicated upon any of said awards and orders;

It is further ORDERED, ADJUDGED AND DECREED that The Order of Railroad Telegraphers, its Subordinate Divisions, System Divisions, Local Divisions, Local Boards of Adjustment, members, officers, agents, servants, employes, attorneys, and all persons in active concert or participation with them, be and they are hereby enjoined and restrained from prosecuting against Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, or either of them,

> Civil Action No. 4572, entitled "The Order of Railroad Telegraphers v. Missouri-Kansas-Texas Railroad Company of Texas", pending in the District Court of the United States for the Northern District of Texas, Dallas Division,

and from prosecuting against Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, or either of them,

Civil Action No. 8708(2), entitled "The Order of Railroad Telegraphers v. Missouri-Kansas-Texas Railroad Company", in the District Court of the United States for the Eastern District of Missouri, Eastern Division,

and from prosecuting any other suit or suits or taking any other action against said Railroad Companies, or either of them, to enforce Awards 4735 and 5014, and the Orders accompanying those awards, or any of those awards and orders; and from filing with or prosecuting against said Railroad Companies, or either of them any claim or claims predicated upon any of said awards and orders;

It is further ORDERED, ADJUDGED AND DECREED that the National Railroad Adjustment Board, Third Division, and C. P. Dugan, J. E. Kemp, R. M. Butler, W. H. Castle, E. T. Horsley, J. H. Sylvester, Gerald Orndorff, Roger Sarchet, C. R. Barnes, and J. W. Whitehouse, as members of said Board, and their successors in office, be and they are hereby commanded:

(1) To reopen Dockets CL-3714, CL-3715, CL-3716, TE-4540 and TE-4953;

(2) To consolidate Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953, for a single hearing, and to hold such hearing;

*(3) To give notice of such consolidation and of

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* By order dated October 20, 1954 paragraph (3) on p. 11 of the Final Decree was corrected to read as follows:

"(3) To give notice of such consolidation and of such hearing to Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas; to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to The Order of Railroad Telegraphers; to the employees of Missouri-Kansas-Texas Railroad Company who held the positions of Telegrapher-Cashier at Altus, Oklahoma, and Telegrapher-Cashier at Chanute, Kansas; when those positions were abolished pursuant to Awards 3932 and 3933, and the Orders accompanying those awards; to the employee of Missouri-Kansas-Texas Railroad Company of Texas who held the position of Teleg-

such hearing to Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas; to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, to The Order of Railroad Telegraphers; to the employees of Missouri-Kansas-Texas Raiload Company who held the positions of Telegrapher-Cashier at Altus, Oklahoma, and Telegrapher-Cashier at Chanute, Kansas, when those positions were abolished pursuant to Awards 3932 and 3933, and the Orders accompanying those awards; to the employee of Missouri-Kansas-Texas Railroad Company of Texas who held the position of Telegrapher-Cashier at Lockhart, Texas, when that position was abolished pursuant to Award 3933 and the Order accompanying that award; to the employees of Missouri-Kansas-Texas Railroad Company holding the following positions: Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk at Altus, Oklahoma; Agent and Telegrapher-Clerk at Atoka, Oklahoma; Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; night clerk at Coffeyville, Kansas; to the employees of Missouri-Kansas-Texas Railroad Company of Texas holding the following positions: Agent-Telegrapher, Telegrapher-Cashier, and General Clerk, at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas;

(4) To permit plaintiffs, the labor organizations, and the employees specified in paragraph number (3) of this decree to file papers and other documents in

---

rapher-Cashier at Lockhart, Texas, when that position was abolished pursuant to Award 3933 and the Order accompanying that award; to the employees of Missouri-Kansas-Texas Railroad Company holding the following positions: Agent-Yardmaster, and Telegrapher-Clerk at Altus, Oklahoma; Agent and Telegrapher-Clerk at Atoka, Oklahoma; Agent, and Telegrapher-Clerk at Chanute, Kansas; Agent-Telegrapher at Junction City, Kansas; night clerk at Coffeyville, Kansas; to the employees of Missouri-Kansas-Texas Railroad Company of Texas holding the following positions: Agent-Telegrapher, and General Clerk, at Lockhart, Texas; and Agent, Telegrapher-Cashier, and Telegrapher-Clerk at Stamford, Texas;"

consolidated Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953;

(5) To give plaintiffs, the labor organizations, and the employees specified in paragraph number (3) of this decree an opportunity to be heard in the consolidated hearing; and

(6) To consider the agreement between plaintiffs and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, the agreement between plaintiffs and The Order of Railroad Telegraphers, and the custom and practice under those agreements, in making an award and order in consolidated Dockets CL-3714, CL-3715, CL-3716, TE-4540, and TE-4953.

The Findings of Fact and Conclusions of Law which the Court has rendered in this cause are hereby affirmed and made a part of this decree.

It is further ORDERED, ADJUDGED AND DECREED that all costs be and they are hereby taxed against defendant The Order of Railroad Telegraphers and defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Enter:

JOHN P. BARNES,
United States District Judge.

Chicago, Illinois,
September 13, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHET AND THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP,

Respondents.

BRIEF FOR RESPONDENT ILLINOIS CENTRAL RAILROAD COMPANY IN ANSWER TO THE BRIEF FOR AMICI CURIAE.

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QUESTIONS PRESENTED.

1. Whether Section 3 First (j) of the Railway Labor Act requires the National Railroad Adjustment Board to give notice of hearings and an opportunity to be heard, to all "involved" employees and their unions.

2. Whether an employee performing certain work and his union are "involved" in a dispute before the Board between a railroad and another union claiming the same work.

3. Whether the courts may require the Board to discharge its statutory duty.

PRELIMINARY STATEMENT.

The statement of the case, containing facts material to the questions presented, is fully set forth in the brief of respondent, Illinois Central Railroad Company, which was filed in answer to the brief for Petitioners (Ill. Cen. br. 2-6).

ARGUMENT.

I.

THE RAILWAY LABOR ACT REQUIRES THAT NOTICE SHALL BE GIVEN TO ALL EMPLOYEES AND UNIONS INVOLVED IN DISPUTES BEFORE THE BOARD.

Throughout their brief *Amici Curiae* seek to convey the erroneous impression that this case involves "overlapping contracts". Such is not the fact. The sole purpose of this litigation is to require the Board to perform its statutory duty by giving due notice and opportunity to be heard to an individual and his union who are "involved" in a dispute pending before the Board. It is not the position of Illinois Central, and the court below did not hold (as contended by *Amici Curiae*, br. 1-3) that the Board may rewrite agreements, pass upon their validity, or determine the rights of the parties to contract with respect to a particular subject matter. It is the position of Illinois Central and the court below did hold (R. 40-41, 56) that the Board must comply with the mandate of Congress as expressed in Section 3 First (j) of the Railway Labor Act [45 U.S.C. 153 First (j)].

Illinois Central expressly denies there is any "overlapping" of contracts or "dual" liability. This is something, however, the Board must decide when it considers the case on the merits, after all involved employees and their unions have been given notice and an opportunity to be heard. At that time the Board may resolve such dispute, if there be one, by considering the agreements of each union in the light of the other, giving due regard to usage, practice and custom, as this Court has said it should do.

Order of Conductors v. *Pitney*, 326 U. S. 561; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239.

The merits of the case before the Board are not, however, before this Court for review. Before the Board is entitled to consider the merits, it must comply with the jurisdictional requirements imposed by Congress. That is what the Board has refused to do; it is what Illinois Central contends the Board must do; it is all that the court below has required the Board to do; and it is the only question before this Court for decision.

At this stage of the proceedings before the Board, there is no question involved as to the *right* of crafts to contract for the work in question, or of the *validity* of any agreement, as *Amici Curiae* infer (*Am. Cur.* br. 5).

II.

THE EMPLOYEE, DOING THE WORK CLAIMED IN THE PROCEEDING BEFORE THE BOARD AND HIS UNION ARE "INVOLVED".

Amici Curiae contend that the only parties "involved" in disputes before the Board are the claimant union and the Carrier (*Am. Cur.* br. 7-15). That such a construction of the wording of Section 3 First (j) is not a proper one, is clearly shown by the language of this Court in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711. In that case the Court, in construing said section, said (pp. 734-735):

> "* * * § 3 First (j) not only requires the Board to give 'due notice of all hearings *to the employee* . . . involved in any dispute *submitted* . . .,' but provides for 'parties' to be heard 'either *in person*, by counsel, or by other representatives, as they may respectively elect.'
>
> "These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated.

> Such organizations do not and cannot appear and be heard 'in person.' Nor would the provision for notice '*to the employee* . . . involved in any dispute' be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose." (Court's italics.)

If Congress had intended that notice and an opportunity to be heard should be limited to parties, the statute would have said so. Instead, it provides that notice of hearings should be given to "employees * * * involved in any dispute submitted" to the Board by the parties. Congress made no attempt to restrict the hearings to the claimant and carrier but realized that others might be interested persons with a right to notice and hearing.

It is impossible to conceive of anyone more entitled to notice and hearing than one whose job or work is sought in a claim, and the union holding the contract to which he is subject. In its claim filed with the Board, Telegraphers seek to transfer to a telegrapher the work being done by a clerk (*Am. Cur.* br. 2). Under these circumstances there can be no doubt that Shears (the one doing the work) and the Clerks (his union) are "involved", for, if the Telegraphers are successful, Shears and the Clerks will be displaced. *Amici Curiae* state (*Am. Cur.* br. 12) that " * * * few courts have as yet been called upon to decide the question here involved." On the contrary, 26 federal judges have passed upon the question and held that Section 3 First (j) requires the Board to give due notice of its proceedings to the one doing the work claimed and to his union. The first such case was *Nord* v. *Griffin*, C. A. 7 (1936), 86 F. (2d) 481, cer. den., 300 U. S. 673. Since that decision, the courts have, in an unbroken line, adhered to and reaffirmed

that interpretation.* *Estes* v. *Union Terminal Co.*, C. A. 5 (1937), 89 F. (2d) 768; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A. 7 (1948), 171 F. (2d) 594; *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. (2d) 527; *Hunter* v. *Atchison, Topeka & Santa Fe R. Co.*, C. A., 7 (1951), 188 F. (2d) 294; *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Railway & S. S. C.*, C. A. 7 (1951), 188 F. (2d) 302; *Brotherhood* v. *Pennsylvania R. Co.*; D. C. W. D. Penn. (1952), 107 F. Supp. 924; *Allain* v. *Tummon*, C. A. 7 (1954), 212 F. (2d) 32; *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, D. C. E. D. Mo. (1954), 26 Labor Cases ¶ 68,622; *Missouri-Kansas-Texas R. Co.* v. *N. R. A. B.*, D. C. E. D. Ill. (1954), 26 Labor Cases ¶ 68,671.

That such a construction is proper, is made clear by a reading of the plain, unambiguous language of the statute itself as well as by the history of the Act. After setting forth the composition of the various Divisions of the Board, Congress concisely and unequivocally prescribed the duties of the Board [45 U. S. C. 153 First (j)]. These duties are to be fulfilled prior to making an award under sub-sections (m) and (n). The very first duty or obligation imposed upon the Board [under sub-section (j)] after a claim has been filed, is the command that the Board "shall give due notice of all hearings." The

* Although *amici curiae* allege that the case of *Order of Railroad Telegraphers* v. *N. O. T. & M. R. Co.*, C. A. 8 (1946), 156 F. 2d 1, is in conflict with the decisions cited above, a careful reading of that case will disclose that the court did not pass upon the notice question. In any event the Eighth Circuit has more recently held that notice and an opportunity to be heard must be given to all employees and unions involved in disputes before the Board in accordance with the requirements of Section 3 First (j) of the Act. *Brotherhood of Railroad Trainmen* v. *Templeton*, C. A. 8 (1950), 181 F. 2d 527, certiorari denied 340 U. S. 823, rehearing denied 340 U. S. 885. To the same effect is *Order of Railroad Telegraphers* v. *N. O. T. & M. Ry. Co.*, D. C. E. D. Mo. (1954), 26 Labor Cases ¶ 68,622.

Board's refusal to obey that command is the subject of this litigation.

It is significant that *amici curiae* in quoting from the hearings before the Congressional committees considering the 1934 Railway Labor Act, failed to include that portion of the testimony relating to the appearance and right to be heard of others than the claimant union and the carrier involved. We have no quarrel with the statement by Mr. Eastman (*Am. Cur.* br. 6) as to the Board's function *after* it obtains jurisdiction. However, to effect a proper interpretation of the rules or agreements it was recognized that individuals doing work claimed, and their unions, were entitled to notice and an opportunity to be heard. See Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess., p. 51 (Ill. Cen. br. 26-27). The same principle was reflected by this Court in the *Pitney* (326 U. S. 561) and *Slocum* (339 U. S. 239) cases.

The cases of *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235, and *Order of R. R. Tel.* v. *New Orleans, Texas & Mex. Ry. Co.*, 156 F. (2d) 1, cited by *amici curiae* (*Am. Cur.* br. 12-14) are not in point. In those cases the courts held they were without jurisdiction to decide the controversies because jurisdictional dispute questions were presented for decision by the courts. There is no such issue here. Illinois Central is not here asking the courts to interpret either the Telegraphers' or the Clerks' contract, or to declare the rights of the parties under those agreements, or to decide who is entitled to the work in question. Illinois Central merely asks that the Court compel the Board to comply with the command of the Railway Labor Act.

This is not a case of deciding which union has the right to contract, as the *amici curiae* imply (*Am. Cur.* br. 15). It is a case of applying existing contracts to specific work to determine the coverage of the work.

III.

NOTICE AND OPPORTUNITY TO BE HEARD ARE ESSENTIAL TO THE PROPER FUNCTION OF THE BOARD.

There is no merit to the continued and repetitious argument of *amici curiae* that the decision of the court below requires the Board to resolve conflicting areas of contracts dealing with work jurisdiction. *Amici curiae's* illogical approach is, perhaps, most clearly shown by the fact that they proceed upon an assumption based upon an assumption. They first assume the Telegraphers' and Clerks' contracts overlap. This, however, is not true; and when, and if, the Board obtains jurisdiction Illinois Central will show the Board it is not true. *Amici curiae* next assume that if the contracts overlap, the Board must rewrite the agreements. This is not true. The Board need only interpret each agreement in the light of the other, taking into consideration usage, custom and practice.

Surely the Railway Labor Act was intended to provide protection to the carriers as well as to employees and unions. Accordingly, it is apparent that Illinois Central is entitled to have the Board give notice and an opportunity to be heard to Shears and the Clerks, for only in this way can there be a full, complete and valid determination of the Telegraphers' claim. It is common knowledge that the labor agreements between carriers and unions do not define with certainty the individual positions covered. It was for that reason that this Court in *Order of Conductors* v. *Pitney*, 326 U. S. 561, wisely concluded:

> "* * * interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. (Citing cases.) For O. R. C.'s agreements

with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood" (pp. 566-567).

CONCLUSION.

For the foregoing reasons, and for the reasons heretofore given in its brief in answer to the Petitioners, Illinois Central respectfully submits that this case should be dismissed, or in the alternative, that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, et al., *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

OPPOSITION TO PETITION FOR MODIFICATION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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---

OPPOSITION TO PETITION FOR MODIFICATION

Counsel for some of the respondents have filed a "Petition for Modification" asking the Court to change some of the language in its opinion.

They do not ask for reconsideration. They do not object to what the Court did. They object only to the language with which the Court did it.

We consider it inappropriate for parties to try to rewrite a court's opinion after a court has decided a case. If coun-

sel for the Carrier Members of the Board had been given the opportunity to write the Court's opinion, apparently they would have written it differently. They point to no obvious mistake that requires correction. If we had written the Court's opinion, we too would have written it differently.

We suppose that litigants in other proceedings will derive what comfort they can from the opinion, and that advocates will cite it in support of propositions they advocate. We doubt that any language the Court may employ will prevent such practice, or that the practice should be prevented.

If opinions of the Court are to be modified in cases not of obvious mistake, but are to be attuned to the nuances that litigants feel are proper in the particular circumstances, judicial proceedings will be protracted interminably.

We submit the Petition for Modification should be denied.

Respectfully submitted,

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June 24, 1955